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38 CFR Part 5

Apportionments to Dependents and Payments to Fiduciaries and
Incarcerated Beneficiaries; Proposed Rule

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 5

RIN 2900-AL74

Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to reorganize and rewrite in plain language regulations governing VA compensation, pension, burial, and related benefits, including regulations concerning apportionments, payments to fiduciaries, and payments to incarcerated beneficiaries and fugitive felons. These revisions are proposed as part of VA's rewrite and reorganization of all of its compensation and pension rules in a logical, claimant-focused, and user-friendly format. The intended effect of the proposed revisions is to assist claimants, beneficiaries, and VA personnel in locating and understanding these regulations.

DATES: Comments must be received by VA on or before March 15, 2011.

ADDRESSES: Written comments may be submitted through <http://www.regulations.gov>; by mail or hand-delivery to: Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AL74—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment (not a toll-free number). In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

William F. Russo, Director of Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Washington, DC 20420, (202) 461-4902 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Secretary of Veterans Affairs has established an Office of Regulation

Policy and Management to provide centralized management and coordination of VA's rulemaking process. One of the major functions of this office is to oversee a Regulation Rewrite Project (the Project) to improve the clarity and consistency of existing VA regulations. The Project responds to a recommendation made in the October 2001 "VA Claims Processing Task Force: Report to the Secretary of Veterans Affairs." The Task Force recommended that the compensation and pension regulations be rewritten and reorganized in order to improve VA's claims adjudication process. Therefore, the Project began its efforts by reviewing, reorganizing, and redrafting the content of the regulations in 38 CFR part 3 governing the compensation and pension program of the Veterans Benefits Administration. These regulations are among the most difficult VA regulations for readers to understand and apply.

Once rewritten, the proposed regulations will be published in several portions for public review and comment. This is one such portion. It includes proposed rules regarding apportionments, payments to fiduciaries, and the manner in which VA reduces or discontinues benefit payments when beneficiaries are incarcerated or are fugitive felons. It also includes proposed rules regarding the adjustment and resumption of benefits based upon receipt of hospital, domiciliary, and nursing home care. After review and consideration of public comments, final versions of these proposed regulations will ultimately be published in a new part 5 in 38 CFR.

Outline

Overview of New Part 5 Organization
 Overview of This Notice of Proposed Rulemaking
 Table Comparing Current Part 3 Rules With Proposed Part 5 Rules
 Content of Proposed Regulations

Subpart L—Payments and Adjustments to Payments

Hospital, Domiciliary, and Nursing Home Care Reductions and Resumptions

- 5.720 Adjustments to special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.721 Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
- 5.722 Reduction of Improved Pension while a veteran is receiving domiciliary or nursing home care.

- 5.723 Reduction of Improved Pension while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility.
- 5.724 Reduction or discontinuance of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.725 Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
- 5.726 Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.727 Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.728 Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.729 Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
- 5.730 Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries

Determining Eligibility for Apportionments

- 5.770 Apportionment claims.
 - 5.771 Special apportionments.
 - 5.772 Veteran's benefits apportionable.
 - 5.773 Veterans disability compensation.
 - 5.774 Benefits not apportionable.
 - 5.780 Eligibility for apportionment of pension.
 - 5.781 Eligibility for apportionment of a surviving spouse's dependency and indemnity compensation.
 - 5.782 Effective date of apportionment grant or increase.
 - 5.783 Effective date of apportionment reduction or discontinuance.
 - 5.784 Special rules for apportioned benefits on death of beneficiary or apportionee.
- ##### Incompetency and Payments to Fiduciaries and Minors
- 5.790 Determinations of incompetency and competency.
 - 5.791 General fiduciary payments.
 - 5.792 Institutional awards.
 - 5.793 Limitation on payments for a child.
 - 5.794 Beneficiary rated or reported incompetent.
 - 5.795 Change of name of fiduciary.
 - 5.796 Child's benefits to a fiduciary of an incompetent surviving spouse.
 - 5.797 Testamentary capacity for VA insurance purposes.
 - 5.798 Payment of disability compensation previously not paid because an

incompetent veteran's estate exceeded \$25,000.

Payments to Incarcerated Beneficiaries

5.810 Incarcerated beneficiaries—general provisions and definitions.

5.811 Limitation on disability compensation during incarceration.

5.812 Limitation on dependency and indemnity compensation during incarceration.

5.813 Discontinuance of pension during incarceration.

5.814 Apportionment when a primary beneficiary is incarcerated.

5.815 Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration.

5.816 Resumption of pension upon a beneficiary's release from incarceration.

5.817 Fugitive felons.

Non-Inclusion of Certain Part 3 Rules in Part 5

Endnote Regarding Amendatory Language Paperwork Reduction Act of 1995 Regulatory Flexibility Act Executive Order 12866

Unfunded Mandates

Catalog of Federal Domestic Assistance Numbers and Titles

List of Subjects in 38 CFR Part 5

Overview of New Part 5 Organization

We plan to organize the part 5 regulations so that most provisions governing a specific benefit are located in the same subpart, with general provisions pertaining to all compensation and pension benefits also grouped together. This organization will allow claimants, beneficiaries, and their representatives, as well as VA adjudicators, to find information relating to a specific benefit more quickly than the organization provided in current part 3.

The first major subdivision would be "Subpart A—General Provisions." It would include information regarding the scope of the regulations in new part 5, general definitions, and general policy provisions for this part. This subpart was published as proposed on March 31, 2006. *See* 71 FR 16464.

"Subpart B—Service Requirements for Veterans" would include information regarding a veteran's military service, including the minimum service requirement, types of service, periods of war, and service evidence requirements. This subpart was published as proposed on January 30, 2004. *See* 69 FR 4820.

"Subpart C—Adjudicative Process, General" would inform readers about claims and benefit application filing procedures, VA's duties, rights and responsibilities of claimants and beneficiaries, general evidence requirements, and general effective dates for new awards, as well as revision of decisions and protection of

VA ratings. This subpart was published as three separate Notices of Proposed Rulemaking (NPRMs) due to its size. The first, concerning the duties of VA and the rights and responsibilities of claimants and beneficiaries, was published as proposed on May 10, 2005. *See* 70 FR 24680. The second, covering general evidence requirements, effective dates for awards, revision of decisions, and protection of VA ratings, was published as proposed on May 22, 2007. *See* 72 FR 28770. The third, concerning rules on filing VA benefits claims, was published as proposed on April 14, 2008. *See* 73 FR 20136.

"Subpart D—Dependents and Survivors" would inform readers how VA determines whether an individual is a dependent or a survivor for purposes of determining eligibility for VA benefits. It would also provide the evidence requirements for these determinations. This subpart was published as proposed on September 20, 2006. *See* 71 FR 55052.

"Subpart E—Claims for Service Connection and Disability Compensation" would define service-connected disability compensation and service connection, including direct and secondary service connection. This subpart would inform readers how VA determines service connection and entitlement to disability compensation. The subpart would also contain those provisions governing presumptions related to service connection, rating principles, and effective dates, as well as several special ratings. This subpart has been published as three separate NPRMs due to its size. The first, concerning presumptions related to service connection, was published as proposed on July 27, 2004. *See* 69 FR 44614. The second, relating to special ratings and ratings for health care eligibility only, was published as proposed on October 17, 2008. *See* 73 FR 62004. The third, relating to service-connected and other disability compensation, was published as proposed on September 1, 2010. *See* 75 FR 53744.

"Subpart F—Nonservice-Connected Disability Pensions and Death Pensions" would include information regarding the three types of nonservice-connected pension: Old-Law Pension, Section 306 Pension, and Improved Pension. This subpart would also include those provisions that state how to establish entitlement to Improved Pension and the effective dates governing each pension. This subpart was published as two separate NPRMs due to its size. The portion concerning Old-Law Pension, Section 306 Pension, and elections of Improved Pension was published as

proposed on December 27, 2004. *See* 69 FR 77578. The portion concerning eligibility and entitlement requirements, as well as effective dates, for Improved Pension was published as proposed on September 26, 2007. *See* 72 FR 54776.

"Subpart G—Dependency and Indemnity Compensation, Death Compensation, Accrued Benefits, and Special Rules Applicable Upon Death of a Beneficiary" would contain regulations governing claims for dependency and indemnity compensation (DIC); death compensation; accrued benefits; benefits awarded, but unpaid at death; and various special rules that apply to the disposition of VA benefits, or proceeds of VA benefits, when a beneficiary dies. This subpart would also include related definitions, effective-date rules, and rate-of-payment rules. This subpart was published as two separate NPRMs due to its size. The portion concerning accrued benefits, death compensation, special rules applicable upon the death of a beneficiary, and several effective-date rules, was published as proposed on October 1, 2004. *See* 69 FR 59072. The portion concerning DIC benefits and general provisions relating to proof of death and service-connected cause of death was published as proposed on October 21, 2005. *See* 70 FR 61326.

"Subpart H—Special and Ancillary Benefits for Veterans, Dependents, and Survivors" would pertain to special and ancillary benefits available, including benefits for children with various birth defects. This subpart was published as proposed on March 9, 2007. *See* 72 FR 10860.

"Subpart I—Benefits for Certain Filipino Veterans and Survivors" would pertain to the various benefits available to Filipino veterans and their survivors. This subpart was published as proposed on June 30, 2006. *See* 71 FR 37790.

"Subpart J—Burial Benefits" would pertain to burial allowances. This subpart was published as proposed on April 8, 2008. *See* 73 FR 19021.

"Subpart K—Matters Affecting the Receipt of Benefits" would contain provisions regarding bars to benefits, forfeiture of benefits, and renouncement of benefits. This subpart was published as proposed on May 31, 2006. *See* 71 FR 31056.

"Subpart L—Payments and Adjustments to Payments" would include general rate-setting rules, several adjustment and resumption regulations, and election-of-benefit rules. Because of its size, this subpart, except for several regulations concerning hospital, domiciliary, and nursing home care reductions and resumptions, was published in two

separate NPRMs. The first, concerning payments to beneficiaries who are eligible for more than one benefit, was published as proposed on October 2, 2007. See 72 FR 56136. The second, concerning provisions applicable to payment of VA benefits and adjustments to payments, was published as proposed on October 31, 2008. See 73 FR 65212. The hospital, domiciliary, and nursing home care regulations are included in this NPRM.

The final subpart, “Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries,” would include regulations governing apportionments, benefits for incarcerated beneficiaries, and guardianship. This subpart is the primary subject of this NPRM.

Some of the regulations in this NPRM cross-reference other compensation and pension regulations. If those regulations have been published in this or earlier NPRMs for the Project, we cite the proposed part 5 section. We also include, in the relevant portion of the **SUPPLEMENTARY INFORMATION**, the **Federal Register** page where a proposed part 5 section published in an earlier NPRM may be found. However, where a regulation proposed in this NPRM would cross-reference a proposed part 5 regulation that has not yet been published, we cite to the current part 3 regulation that deals with the same subject matter. The current part 3 section we cite may differ from its eventual part 5 counterpart in some respects, but this method will assist readers in understanding these proposed regulations where no part 5 counterpart has yet been published.

Because of its large size, proposed part 5 will be published in a number of NPRMs, such as this one. VA will not adopt any portion of part 5 as final until all of the NPRMs have been published for public comment.

In connection with this rulemaking, VA will accept comments relating to a prior rulemaking issued as a part of the Project, if the matter being commented on relates to both rulemakings.

Overview of This NPRM

This NPRM pertains to regulations that govern apportionments of benefits, as well as certain matters pertaining to fiduciaries of incompetent beneficiaries and minors. It also pertains to regulations governing incarcerated beneficiaries and beneficiaries who are fugitive felons. These regulations would be contained in proposed Subpart M of new 38 CFR part 5. This NPRM also includes eleven regulations concerning reductions of VA benefits based on

hospitalization at government expense. These regulations would be contained in proposed Subpart L of new 38 CFR part 5.

Although these regulations have been substantially restructured and rewritten for greater clarity and ease of use, most of the basic concepts contained in these proposed regulations are the same as their existing counterparts in 38 CFR part 3. However, a few substantive differences are proposed, as are some regulations that do not have counterparts in 38 CFR part 3.

Table Comparing Current Part 3 Rules With Proposed Part 5 Rules

The following table shows the relationship between the proposed regulations contained in this NPRM and the current regulations in part 3:

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph
5.720(a)	3.551(a), 3.552(b)(3), 3.556(a), 3.556(f)
5.720(b)	3.501(b)(1) and (2), 3.552(a)(1), (b)(1), (b)(2), and (c)
5.720(c)(1)	3.552(b)(2), 3.501(b)(2)
5.720(c)(2)	3.552(d) and (i)
5.720(c)(3)	3.552(f) and (g)
5.720(c)(4)	3.552(h)
5.720(c)(5) and (6)	3.552(a)(3)
5.720(d)	3.552(a)(1) and (2)
5.720(e)(1)	New.
5.720(e)(2) and (3)	3.552(b)(3)
5.720(f)	3.552(k)
5.721	New.
5.722(a)(1)	3.551(e)(1)
5.722(a)(2)	3.551(e)(1)
5.722(a)(3)	3.501(i)(5)(i), 3.551(e)(1)
5.722(b)(1)	3.551(a)
5.722(b)(2) and (b)(3)	New.
5.722(b)(4)	3.551(e)(6)
5.722(c)	3.551(e)(3)
5.722(d)(1)	3.501(i)(5)(ii), 3.551(e)(2)
5.722(d)(2)	New.
5.722(e)	3.551(e)(4)
5.722(f)	3.551(h)
5.722(g)	3.551(e)
5.723	3.501(i)(6), 3.502(f), 3.551(i)
5.724(a)	3.501(b)(1), 3.552(b)(1) and (e) [third and fourth sentences]
5.724(b)	3.552(a)(1) and (2)
5.724(c)	3.501(i)(3), 3.552(b)(3)
5.724(d)	3.552(k)
5.725	New.
5.726(a)(1)	3.551(a) and (c)(1)
5.726(a)(2)	3.551(g)
5.726(a)(3)	3.551(c)(1)
5.726(a)(4)	3.501(i)(2)(i), 3.551(c)(1)
5.726(a)(5)	3.551(f)
5.726(b)(1)	3.551(a)

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph
5.726(b)(2) and (3) ...	New.
5.726(c)	3.551(c)(3)
5.726(d)(1)	3.501(i)(2)(iii), 3.551(c)(2)
5.726(d)(2)	New.
5.727(a)(1)	3.551(b)(1)
5.727(a)(2)	3.551(g)
5.727(a)(3)	3.551(b)(1)
5.727(a)(4)(i)	3.501(i)(1), 3.551(b)(1)
5.727(a)(4)(ii)	3.551(b)(3)
5.727(b)(1)	3.551(a)
5.727(b)(2) and (3) ...	New.
5.727(c)(1)	3.551(b)(2)
5.727(c)(2)(i)	New.
5.727(c)(2)(ii)	3.551(b)(3)
5.728(a)	3.501(b)(1), 3.552(b)(1), (e) and (j)
5.728(b)	3.552(e)
5.728(c)	3.552(b)(3)
5.729(a)	3.556(a)
5.729(b)	3.556(b) and (d) [third sentence]
5.729(c)	3.556(c)
5.729(d)	3.556(d) [first sentence] and (e)
5.730(a)	3.556(a)(1)
5.730(b)	3.556(b)
5.730(c)	3.556(e)
5.730(d)	3.556(d)
5.770	3.450
5.771	3.451
5.772(a)	3.452(a)
5.772(b)	3.452(b)
5.772(c)	3.452(c), 3.454
5.772(d)	3.452(d)
5.773	3.453
5.774	3.58, 3.458, 3.503(a)(2), 3.901(c), and 3.902(c)
5.780	3.450(a)(1)(ii), 3.451, and 3.460(b) and (c)
5.781(a)	3.461(a)
5.781(b)	3.461(b)(1)
5.782(a)	3.400(e)(1)
5.782(b)(1)	Introduction to 3.400(e)
5.782(b)(2)	New.
5.782(b)(3)	3.400(e)(2)
5.782(b)(4)	3.665(f)
5.783(a)	3.500(d)(1)
5.783(b)(1) and (2) ...	3.500(g) and (n)
5.783(b)(3)	New.
5.783(b)(4)	New.
5.784(a)	3.1000(b)(2)
5.784(b)(1)	3.1000(b)(1)
5.784(b)(2)	3.1000(b)(3)
5.790(a)	3.353(a)
5.790(b)	3.353(b)
5.790(c)	3.353(c)
5.790(d)	3.353(d)
5.790(e)	3.353(e)
5.790(f)(1)	3.400(x)
5.790(f)(2)	3.400(y)
5.791(a)	3.850(a)
5.791(b)	3.850(c)
5.791(c)	3.850(b)
5.791(d)	3.850(d)
5.791(e)	3.400(n), 3.500(m)

Proposed part 5 section or paragraph	Based in whole or in part on 38 CFR part 3 section or paragraph
5.792(a)	3.852(a)
5.792(b)	3.852(b), 3.852(d) [first sentence]
5.792(c)	3.852(d) [second sentence]
5.792(d)	3.852(c)
5.792(e)	3.401(d)
5.792(f)	3.501(j)
5.793	3.403(a)(2), 3.854
5.794(a)	3.855(a)
5.794(b)(1)	3.855(b)(1)
5.794(b)(2)	3.855(b)(2)
5.794(b)(3)	3.855(b)(3)
5.795	3.856
5.796	3.857
5.797	3.355
5.798	3.853(c)
5.810(a)	3.665(b)
5.810(b)	New.
5.810(c)	3.665(a) and introduction to 3.666
5.810(d)	New.
5.810(e)	3.665(a) and introduction to 3.666
5.810(f)	3.665(a) and introduction to 3.666
5.811(a)	3.665(a) and (c)
5.811(b)	3.665(j)(3)(iii) and (k)
5.811(c)	3.665(d)(1) and (2) and (j)
5.812(a)	3.665(a) and (c)
5.812(b)	3.665(d)(3)
5.812(c)	3.665(l)
5.812(d)	3.665(k)
5.813(a)	Introduction to 3.666
5.813(b)	3.666(d)
5.814(a)(1)	3.665(a)
5.814(a)(2)	3.665(h)
5.814(b)	3.665(e)
5.814(c)	3.666(a)(1), (a)(2), and (a)(3)
5.814(d)	3.666(b)(1), (b)(2) and (b)(4)
5.814(e)	3.665(f), 3.666(a)(4) and (b)(3)
5.815(a)	3.665(i)
5.815(b)	3.665(i)(1) and (i)(3)
5.815(c)	3.665(i)(2) and (i)(3)
5.815(d)	3.665(m)
5.816	3.666(c)
5.817(a)	3.665(n)(1) and 3.666(e)(1)
5.817(b)	3.665(n)(2) and (3); 3.666(e)(2) and (3)

Readers who use this table to compare the proposed provisions with the existing regulatory provisions and observe a substantive difference between them should consult the text that appears later in this document for an explanation of significant changes in each regulation. Not every paragraph of every current part 3 section regarding the subject matter of this rulemaking is accounted for in the table. In some instances, other portions of the part 3 sections that are addressed in these proposed regulations will appear in subparts of part 5 that are being

published separately for public comment. For example, a reader might find a reference to paragraph (a) of a part 3 section in the table, but no reference to paragraph (b) of that section because paragraph (b) will be addressed in a separate NPRM. The table also does not include provisions from part 3 regulations that will not be repeated in part 5. Such provisions are discussed specifically under the appropriate part 5 heading in this preamble. Readers are invited to comment on the proposed part 5 provisions and also on our proposals to omit those part 3 provisions from part 5.

Content of Proposed Regulations

Subpart L: Payments and Adjustments to Payments

Hospital, Domiciliary, and Nursing Home Care Reductions and Resumptions

We propose to rewrite current §§ 3.551, 3.552, and 3.556, by dividing the disability compensation and pension provisions in those sections into separate sections. Each section would address different VA benefits.

Section 5.720 Adjustments to Special Monthly Compensation Based on the Need for Regular Aid and Attendance While a Veteran Is Receiving Hospital, Domiciliary, or Nursing Home Care

Proposed § 5.720 includes provisions for discontinuing special monthly compensation (SMC) that is payable because a veteran is in need of regular aid and attendance or a higher level of care while receiving hospital, domiciliary, or nursing home care.

In proposed § 5.720(a), we would define the terms “hospital care”, “domiciliary or nursing home care”, “temporary absence”, and “regular” and “irregular” discharge or release for purposes of §§ 5.720 through 5.730. Current 38 CFR 3.551(a) defines the terms “hospitalized” and “hospitalization” to include “[h]ospital treatment in a Department of Veterans Affairs hospital or in any hospital at Department of Veterans Affairs expense” and “[i]nstitutional, domiciliary or nursing home care in a Department of Veterans Affairs institution or domiciliary or at Department of Veterans Affairs expense.” We propose to not include the terms “institution” or “institutional” in the definition of “hospital care” in § 5.720(a)(1) or elsewhere in §§ 5.720–5.730 because, with respect to specific types of VA care or facilities, the terms are obsolete. In 1978, Congress amended 38 U.S.C. 3203(a)(1), the precursor to 38 U.S.C. 5503(a), in part by replacing a reference

to “hospital treatment, institutional, or domiciliary care” with references to “domiciliary care” and “hospital or nursing home care.” See Veterans’ and Survivors’ Pension Improvement Act of 1978, Public Law 95–588, section 307, 92 Stat. 2497, 2510. Despite this change of terminology in the authorizing statute applicable to Improved Pension, VA kept references to “institutional” care in its part 3 regulations on hospitalization adjustments because the statutes applicable to Section 306 Pension and Old-Law Pension still refer to institutional care and do not refer to nursing home care. However, VA has interpreted “institutional care” in these statutes to include “nursing home care”. Accordingly, as stated in § 3.551(a), VA applies the definition of “hospitalized” that includes “nursing home care” to §§ 3.551 through 3.556, including to those provisions pertaining to Section 306 Pension and Old-Law Pension. Therefore, in keeping with current 38 U.S.C. 5503(a), we have not included any reference to institutional care in proposed §§ 5.720–5.730.

Current 38 CFR 3.556(f) defines a “regular” discharge as one which “is granted because of having received maximum hospital benefits.” To further clarify the definition, in proposed § 5.720(a)(3), we would define the term “regular discharge or release” to mean “a veteran, surviving spouse, or child is discharged or released at the order of a medical professional based on that professional’s opinion that there is no medical reason to continue care.” VA’s regulations on reduction of pension benefits refer only to veterans and surviving spouses. We propose to add “child” to paragraphs (a)(3)–(a)(5) to make these definitions consistent with Veterans’ Benefits Act of 2010, Public Law 111–275, section 606, 124 Stat. 2886.

Proposed § 5.720(a)(4), defining “irregular discharge or release,” is derived from current § 3.556(f), which defines the term specifically, and current § 3.552(b)(3), which implicitly defines the term as it applies to readmissions to hospital, domiciliary, or nursing home care. Proposed § 5.720(a)(4) defines the term to mean a discharge or release from a period of hospital, domiciliary, or nursing home care for any of the following reasons: refusal to accept treatment, neglect of treatment, obstruction of treatment, disciplinary reasons, refusal to accept transfer to another facility, leaving a facility against medical advice, or failure to return from unauthorized or authorized absence. The current rules do not explicitly address those patients who leave hospital, domiciliary, or

nursing home care without authorization from the staff and fail to return. VA's practice is to treat such an absence as an irregular discharge or release even if the patient is not formally discharged or released at the time of departure. Accordingly, proposed § 5.720(a)(4), defining "irregular discharge or release" would include situations in which a veteran, surviving spouse, or child fails to return from unauthorized absence.

Proposed § 5.720(a)(5) would define "temporary absence" to mean "a veteran, surviving spouse, or child is placed on non-bed care status or authorized absence." The definition derives from current § 3.556(a). We would also clarify that a temporary absence is not a discharge or release.

In proposed § 5.720(c), describing how to calculate the reduced rate of SMC, we have identified the benefits to be reduced and the new rates by referring to the appropriate part 5 regulations as a convenience for the reader. Identification by implementing regulation is not a substantive change from current § 3.552, which identifies a given benefit by the benefit's authorizing statute and verbal description. More specifically, in proposed § 5.720(c)(4), derived from current § 3.552(h), we identify the benefit to be reduced as SMC under § 5.326(i). Because the reference to § 5.326(i) signifies only SMC payable under 38 U.S.C. 1114(m) for blindness in both eyes leaving a veteran so significantly disabled as to need regular aid and attendance, § 5.720(c)(4) identifies the same benefit as § 3.552(h) does, and it is unnecessary to state in proposed § 5.720(c)(4) that vision must be better than light perception only. Such language is necessary in § 3.552(h) because SMC under section 1114(m) may be paid for either blindness in both eyes having only light perception or for blindness in both eyes leaving the veteran so significantly disabled as to be in need of regular aid and attendance. Only SMC based on the latter condition is reduced based on hospital, domiciliary, or nursing home care, and only SMC based on the latter condition is payable under § 5.326(i); therefore, further clarification is unnecessary in § 5.720(c)(4).

In proposed paragraphs (c)(1) and (f)(1), we have clarified that SMC paid under 38 U.S.C. 1114(r) is discontinued or not payable while a veteran is receiving hospital care that is provided at United States Government expense. We also specify that the discontinuance required by paragraph (c)(1) is made only for the receipt of hospital care and is not made for the receipt of

domiciliary or nursing home care. Both of these clarifications are based upon the plain language of the authorizing statute, 38 U.S.C. 5503(c).

In proposed § 5.720(c)(2)(ii), we have referred to a veteran who "has been awarded the intermediate or next higher rate based on additional disability that is independently ratable." Although current § 3.552(i) refers more specifically to "disability independently ratable at 50 percent or 100 percent", such specificity is unnecessary. The reference in § 5.720(c)(2)(ii) to proposed § 5.331(d)(1) and (e)(1) implies that the veterans described are those with disability independently ratable at 50 percent or higher (under § 5.331(d)(1)) or 100 percent (under § 5.331(e)(1)). Further, if the proposed rule was specific, it is possible that it would be misconstrued to exclude veterans with disability independently ratable at 60, 70, 80, or 90 percent.

Proposed § 5.720(d) restates in plain language exceptions contained in § 3.552(a)(1) and (a)(2). As we have proposed elsewhere in part 5, we would substitute the phrase "loss of use" for the current term "paralysis". See 73 FR 62004, 62013, 62023 (Oct. 17, 2008) (pertaining to proposed § 5.330(d)). The term "paralysis" is not defined for VA purposes. It is a term most commonly associated with inability to move or have sensation in a body part as a result of an injury or of a disease of the nervous system. This is a narrow definition that does not address disabilities resulting from muscle or bone damage. The phrase "loss of use" is used extensively by VA personnel in rating disabilities involving the extremities and therefore is an appropriate substitute term. The phrase "loss of use" will be clearer to the reader.

Proposed § 5.720(e)(1) is a new provision that states explicitly a rule that is implicit in current § 3.552(b)(3). Under § 3.552(b)(3), from which § 5.720(e)(2) and (3) are derived, VA will, in certain circumstances, immediately reduce a veteran's rate of SMC if the veteran is readmitted to hospital, domiciliary, or nursing home care after a prior period of care for which VA had reduced or discontinued the veteran's SMC. That rule applies if the veteran was given an irregular discharge or release from the prior period of care and the readmission is less than 6 months thereafter. In contrast, proposed § 5.720(e)(1) provides that a readmission to care following a regular discharge from a prior period of care will be treated as if it were an initial admission (i.e., the reduction will not be immediate). Under 38 U.S.C.

5503(c), VA is authorized to immediately reduce benefits only if the readmission follows an irregular discharge, not a regular discharge. The new provision explicitly states current VA practice and is favorable to veterans.

Proposed § 5.720 includes references to several SMC regulations—§§ 5.323, 5.324, 5.326, 5.328, 5.330, 5.331, 5.332, and 5.333—which were published as proposed on October 17, 2008. See 73 FR 62004.

Section 5.721 Resumption of Special Monthly Compensation Based on the Need for Regular Aid and Attendance After a Veteran Is on Temporary Absence From Hospital, Domiciliary, or Nursing Home Care or Is Discharged or Released From Such Care

There is no regulation in current 38 CFR part 3 or any statute in 38 U.S.C. regarding resumption of benefits after a veteran whose special monthly compensation based on the need for regular aid and attendance was reduced due to hospital, domiciliary, or nursing home care is discharged or released from such care. Proposed § 5.721 would fill this gap. We have modeled this section on the rules in current § 3.556, "Adjustment on discharge or release", which concerns resumptions of pension benefits upon discharge or release from hospital, domiciliary, or nursing home care. VA has applied these provisions to thousands of veterans' awards over more than 20 years. VA staff can administer them efficiently, and they result in fair and consistent adjustments of veterans' benefits.

Section 5.721(b) would incorporate language from current § 3.556(e), which sets out the rules for resuming benefits following regular discharge or release from hospital, domiciliary, or nursing home care. Section 3.556(e) states that the award resuming benefits "will be based on the most recent rating". The intent of this provision is to ensure that the veteran is paid the proper amount upon discharge or release. For consistency, we have also inserted similar language in §§ 5.725(c)(1) and (2), 5.729(d), and 5.730(c) and (d). Throughout § 5.721(b) and these other sections, instead of using the phrase "based on the most recent rating", we would state, "Payment will be resumed at the rate in effect before the reduction based on [receipt of such care], unless the evidence of record shows that a different rate is required." The use of this broader language throughout these regulations would also encompass beneficiaries whose benefits are not based on a rating decision, such as Improved Pension recipients 65 years of

age or over (to whom proposed § 5.725(c)(2) might apply).

We use the same language in the proposed regulations that govern the resumption of benefits following an irregular discharge. Similar language is not contained in current § 3.556(d), which covers irregular discharge or release. VA regulations originally made no distinction between regular and irregular discharges or releases; the award of benefits following either type of discharge or release was to be based on “the last valid rating.” Vet. Reg. No. 6(c), Instruction No. 2, para. IV(e) (Oct. 18, 1934). When VA amended its regulations to distinguish between these types of discharges or releases, VA inadvertently failed to provide for the resumption of the rate in effect prior to the period of care that ended with the irregular discharge or release. See R&PR 1256(A) (Mar. 4, 1947).

Section 5.722 Reduction of Improved Pension While a Veteran Is Receiving Domiciliary or Nursing Home Care

Proposed § 5.722 addresses the reduction of Improved Pension while a veteran is receiving domiciliary or nursing home care.

In proposed § 5.722(a), we would clarify that the requirement that VA reduce Improved Pension being paid to a veteran who receives domiciliary or nursing home care for three full calendar months applies only if such care is continuous. This is consistent with long-standing VA practice.

Proposed § 5.722(b) would provide that VA will not reduce a veteran’s Improved Pension if any one of the exceptions listed applies. Although current § 3.551 provides exceptions to the reduction of pension, the current regulation is not complete. It is important to clearly state when VA will not reduce Improved Pension payable to a veteran who is receiving domiciliary or nursing home care. Therefore, we have added provisions in proposed paragraphs (b)(2) and (3) to expand upon the rules carried forward from current § 3.551. The additions are exceptions for veterans maintained in a State soldiers’ home or receiving domiciliary or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741. The provisions reflect VA’s long-standing practice not to reduce benefits when one of the described situations occurs. Regarding veterans receiving care in a State home, such practice is mandated by 38 U.S.C. 1741. Section 1741(e) specifically provides that per diem payments to a State may not be considered a liability of a third party or

otherwise be used to offset or reduce any other payment made to assist veterans.

Although proposed § 5.722 generally pertains to veterans who have no spouse for VA purposes, the law provides for apportionment of pension benefits to a veteran’s spouse in certain situations. See 38 U.S.C. 5503(a)(2). We have included in proposed paragraph (c) a cross reference to proposed § 5.772(c)(2)(ii), which provides the specific provision relating to such apportionments. The maximum amount that may be apportioned to the spouse is the difference, if any, between \$90 and the amount that the veteran would be entitled to receive if he or she were being paid as a married veteran. That information is contained in current § 3.454(b)(3) and its part 5 counterpart, § 5.772(c)(2)(ii). We have not included the information about the rate payable to a married veteran in § 5.722(c), even though it is contained in its part 3 counterpart, current § 3.551(e), which refers to 38 U.S.C. 1521(c). By eliminating the redundant material, proposed § 5.722(c) is easier to read and understand than current § 3.551(e).

Proposed § 5.722(d)(1) is based on current §§ 3.501(i)(5)(ii) and 3.551(e)(2), which govern payments when a veteran is readmitted within 6 months after a period of domiciliary or nursing home care for which Improved Pension was reduced. Proposed paragraph (d)(2) is a new provision, which provides that, if a veteran is readmitted 6 months or more after a period of domiciliary or nursing home care for which Improved Pension was reduced, the readmission will be considered a new admission. This new provision, based on a long-standing VA procedure, would make § 5.722 more explicit and easier to apply than current § 3.551.

Proposed § 5.722(f) would address veterans who are provided nursing home care as part of a prescribed program of rehabilitation under 38 U.S.C. chapter 17. The provisions are derived from current § 3.551(h) with a few changes. The reference to “Chief Medical Director” is outdated because Congress has changed the title “Chief Medical Director” to “Under Secretary for Health.” Public Law 102–405, section 302(a), 106 Stat. 1972, 1984 (1992). We use the current title.

Proposed § 5.722(g) would state that, “If a veteran becomes entitled to Improved Pension while receiving domiciliary or nursing home care, VA will reduce pension, or pay a reduced rate of pension, in accordance with this section.” This rule is implicit in both the statute, 38 U.S.C. 5503(a), and current § 3.551(e), but is explicit in part 5 to

reflect current VA practice regarding new awards of Improved Pension.

We have intentionally not included the provisions in current § 3.551(d) applicable to reduction of Improved Pension for veterans receiving care before February 1, 1990. The current paragraph provides that if a veteran without spouse or child was receiving hospital, domiciliary, or nursing home care before February 1, 1990, VA will reduce the veteran’s pension during such care. With the passage of time, these provisions are now unnecessary. It is unlikely that VA would now retroactively reduce a veteran’s Improved Pension because of care provided more than 20 years in the past. Consequently, we have also not included current § 3.501(i)(4), which contains effective dates for reductions under § 3.551(d).

Similarly, we also propose to omit the provisions of current § 3.551(e)(5), which provide that effective February 1, 1990, Improved Pension is no longer reduced because of hospital care unless the veteran is receiving Improved Pension based on the need for regular aid and attendance. Such language is unnecessary because proposed § 5.722 is limited to domiciliary or nursing home care. Provisions related to hospital reductions before February 1, 1990, would not be included in part 5.

Section 5.723 Reduction of Improved Pension While a Veteran, Surviving Spouse, or Child Is Receiving Medicaid-Covered Care in a Nursing Facility

Proposed § 5.723 concerns situations in which a veteran, surviving spouse, or child is receiving Medicaid-covered nursing facility care. It is a plain language rewrite of current §§ 3.501(i)(6), 3.502(f), and 3.551(i), except that we have added “child” to make the rule consistent with Veterans Benefits Act of 2010, Public Law 111–275, section 606, 124 Stat. 2886.

We propose to use the term “nursing facility” instead of the term “nursing home”, which is used in the current regulation, because the authorizing statute, 38 U.S.C. 5503(d), uses the term “nursing facility”. Proposed § 5.723(a) includes an exception that is contained in 38 U.S.C. 5503(d)(1)(B) that is not contained in part 3. For veterans receiving care in a State home to which VA makes per diem payments under 38 U.S.C. 1741, VA does not reduce benefits under this section.

In proposed § 5.723(b), we have updated the reference to § 3.103(b)(2), contained in current §§ 3.501(i)(6)(i) and 3.502(f)(1), to refer instead to its proposed part 5 counterpart, § 5.83(b), “Right to notice of decisions and

proposed adverse actions”, which was published as proposed on May 10, 2005. See 70 FR 24680, 24687.

Proposed § 5.723(d) is a new provision that states, “If a veteran, surviving spouse, or child described in paragraph (a) of this section becomes entitled to Improved Pension while receiving Medicaid-covered care in a nursing facility, then VA will not pay more than \$90 per month while the veteran, surviving spouse, or child receives such care.” This rule is implicit in both 38 U.S.C. 5503(d) and current § 3.551(i), but is explicit in part 5 to reflect current VA practice regarding new awards of Improved Pension under these circumstances.

Section 5.724 Reduction or Discontinuance of Improved Pension Based on the Need for Regular Aid and Attendance While a Veteran Is Receiving Hospital, Domiciliary, or Nursing Home Care

Proposed § 5.724 includes provisions for reduction of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care. It is a plain language rewrite of applicable provisions involving Improved Pension in current §§ 3.501 and 3.552.

Proposed § 5.724(b) is based on current § 3.552(a)(1) and (2) and 38 U.S.C. 5503(b). Section 5503(b) prohibits the reduction of any type of VA pension (including Improved Pension based on the need for regular aid and attendance) for VA hospital, institutional, or domiciliary care for Hansen’s disease. We have included similar language regarding VA hospital, domiciliary, or nursing home care for Hansen’s disease in both § 5.724(b)(2) and § 5.728(b)(2).

Current § 3.552(a)(2) states that Improved Pension based on the need for regular aid and attendance will not be reduced if the “pensionable disability is blindness (visual acuity 5/200 or less) or concentric contraction of visual field to 5 degrees or less.” The term “pensionable disability” used in § 3.552(a)(2) is imprecise because more than one disability may serve as the basis for pension entitlement. The description of blindness in § 3.552(a)(2) is based on the description in § 3.351(c)(1), which provides that a veteran or surviving spouse with that level of blindness will be considered to be in need of regular aid and attendance. Therefore, “pensionable disability” as used in § 3.552(a)(2) refers to the disability causing the need for regular aid and attendance, in this case, blindness of the level described in

§ 3.351(c)(1). (The part 5 equivalent to current § 3.351(c)(1) is § 5.390(b)(1) or (2), which was published as proposed on September 26, 2007. See 72 FR 54776, 54794.) We have drafted proposed § 5.724(b)(1)(iii) to state the intended concept in plain language.

Section 5.725 Resumption of Improved Pension and Improved Pension Based on the Need for Regular Aid and Attendance After a Veteran Is on Temporary Absence From Hospital, Domiciliary, or Nursing Home Care or Is Discharged or Released From Such Care

Current § 3.556, “Adjustment on discharge or release”, is the only regulation in current 38 CFR part 3 regarding resumption of pension benefits after a veteran is discharged or released from hospital, domiciliary, or nursing home care. However, much of § 3.556 refers to Old-Law and Section 306 Pensions. In proposed § 5.725, we would use § 3.556 as the basis for a new rule regarding resumptions of Improved Pension and Improved Pension based on the need for regular aid and attendance. Based on VA’s experience in applying § 3.556, this new rule will result in fair, consistent adjustments of Improved Pension and Improved Pension based on the need for regular aid and attendance.

Section 5.726 Reduction of Section 306 Pension While a Veteran Is Receiving Hospital, Domiciliary, or Nursing Home Care

Proposed § 5.726, based on the portions of current 38 CFR 3.551 that pertain to Section 306 Pension, provides for reduction of Section 306 Pension when a veteran is receiving hospital, domiciliary, or nursing home care.

Proposed § 5.726(a)(2), regarding proof of dependents, is based on current § 3.551(g) as it applies to Section 306 Pension. We propose to omit from part 5 the first two sentences of current § 3.551(g), which read, “The veteran will be considered to have neither spouse, child nor dependent parent in the absence of satisfactory proof. Statements contained in the claims folder concerning the existence of such dependents will be considered a prima facie showing.” The first sentence is superfluous because there must be satisfactory proof of every fact to be proven in a veteran’s claim. The second sentence guides VA staff to refrain from seeking evidence of dependents if such evidence is already of record. This guidance is more appropriately contained in internal VA procedures or training publications.

Proposed § 5.726(a)(4) is based on current § 3.551(c)(1), which applies the same effective date of reduction for

domiciliary care as for hospital or nursing home care. However, § 3.501(i)(2), which is based on § 3.551(c), provides two different effective dates of reduction for Section 306 Pension recipients, one for domiciliary care (§ 3.501(i)(2)(i)) and a later one for hospital or nursing home care (§ 3.501(i)(2)(ii)). The effective date under § 3.551(c)(1) for all three types of care is the same as the date used in § 3.501(i)(2)(i) for domiciliary care. The basis for the conflict between the two current rules, §§ 3.551(c)(1) and 3.501(i)(2)(ii), began in 1979, when both §§ 3.501 and 3.551 were amended to implement section 307 of Public Law 95–588, 92 Stat. 2497, 2510 (amending former 38 U.S.C. 3203(a), currently section 5503). 44 FR 45930, 45940–41 (Aug. 6, 1979). Prior to being amended, §§ 3.501(i)(2) and 3.551(c) provided for the reduction in pension to begin after two full calendar months of VA-furnished hospital, domiciliary, or nursing home care. 38 CFR 3.501(i)(2) and 3.551(c) (1978). With regard to VA-furnished hospital and nursing home care, section 307 of Public Law 95–588 delayed the reduction by one full month. 92 Stat. at 2510. VA applied this liberalization to both Improved Pension and Section 306 Pension. 44 FR at 45940–41. However, in VAOPGCPREC 19–90, 55 FR 40990 (Oct. 5, 1990), VA’s General Counsel held that the liberalizations made to the limitation contained in former 38 U.S.C. 3203(a) were not intended to apply to Section 306 Pension. Therefore, in February 1991, VA proposed amendments to § 3.551 to comply with VAOPGCPREC 19–90. 56 FR 7630, 7632 (Feb. 25, 1991). When the final rule was published in December 1991, VA also amended § 3.501(i), purportedly “to conform with the newly adopted amendments to [§ 3.551].” 56 FR 65848 (Dec. 19, 1991). However, amended § 3.501(i)(2)(ii) did not conform with § 3.551(c)(1). *Id.* at 65849, 65850. Accordingly, § 3.551(c)(1), as amended, is consistent with former 38 U.S.C. 3203(a)(1) and VAOPGCPREC 19–90, but § 3.501(i)(2)(ii) is not. Therefore, we propose not to include any equivalent to § 3.501(i)(2)(ii) in part 5.

The second sentence of § 3.551(f) uses the phrase, “exclusive of authorized absences in excess of 96 hours.” The phrase is redundant of the reference to authorized absences in the first sentence of paragraph (f), so we propose not to include it in part 5.

Current § 3.551(f) also contains a reference to a 90-day period of hospitalization. However, paragraph (f) refers solely to calculating hospitalization periods under paragraph

(c), which only refers to 60-day periods. The “90-day” reference is another artifact of the 1979 amendments, discussed above, and is no longer necessary. Therefore, we propose not to include the reference in part 5.

Proposed § 5.726(b) would state the circumstances in which VA will not reduce Section 306 Pension while the veteran is receiving hospital, domiciliary, or nursing home care. The paragraph would incorporate current § 3.551(a) and add two other exceptions that are based on long-standing VA practice, that is, veterans receiving care in a State soldiers’ home or in a State home. See the discussion earlier in this NPRM related to proposed § 5.722(b)(2) and (3) for more information concerning these exceptions to the general reduction rule.

Provisions regarding apportionment of Section 306 Pension benefits to the veteran’s spouse are included in proposed § 5.726(c). We have included a cross reference to proposed § 5.772, which provides the specific rules relating to such apportionments.

Proposed § 5.726(d)(2) provides that if a veteran is readmitted 6 months or more after a period of hospital, domiciliary, or nursing home care, the readmission will be considered a new admission. This provision, based on a long-standing VA procedure, has been added to increase the clarity of the rule stated in current § 3.551.

Section 5.727 Reduction of Old-Law Pension While a Veteran Is Receiving Hospital, Domiciliary, or Nursing Home Care

Proposed § 5.727 addresses veterans receiving Old-Law Pension and the reduction of such benefits while the veteran is receiving hospital, domiciliary, or nursing home care.

Proposed § 5.727(a)(1) is based on current § 3.551(b)(1). Current § 3.551(b)(1) unnecessarily contains the term “dependent parent” as it refers to dependents of a veteran who is in receipt of Old-Law Pension. Prior to being amended in 1972, 38 CFR 3.551(b) applied to reductions of disability compensation and pension. Whereas a veteran receiving disability compensation may receive an additional allowance for dependent parents, payment of Old-Law Pension is neither adjusted nor otherwise affected because of a dependent parent. See 38 U.S.C. 503, 521, 522 (1958) (providing the statutory authority for Old-Law Pension, as in effect June 30, 1960, prior to amendment by Pub. L. 86–211). When § 3.551(b) was amended in 1972 to apply only to pension, the term was nevertheless retained. See 37 FR 19132,

19133 (Sept. 19, 1972). In addition to being unnecessary, the use of “dependent parent” in § 3.551(b) is potentially misleading because it implies that a veteran receiving Old-Law Pension could have a dependent parent. Therefore, in proposed § 5.727(a)(1), we are not including the term.

Proposed § 5.727(a)(2), regarding proof of dependents, is based on current § 3.551(g) as it applies to Old-Law Pension.

In proposed § 5.727(a)(4)(i), we clarify that VA excludes any month (other than the month of admission) that contains an authorized absence from its calculation of the effective date. This rule is not stated in current § 3.551(b)(1) but is based on current § 3.551(b)(3), which pertains to veterans who have been irregularly discharged and then readmitted prior to the effective date of the reduction. To the extent that this clarification is not explicit in part 3, including it in part 5 is favorable to veterans. To apply the rule excluding periods of authorized absence only when a veteran has been irregularly discharged would be unfair to veterans who have complied with their care.

Proposed § 5.727(a)(4)(ii) describes the effect of an irregular discharge that occurs prior to the initial reduction of Old-Law Pension. The first sentence is based on § 3.551(b)(3) and provides that the reduction is effective without regard to the irregular discharge if the readmission occurs before the general effective date. The second sentence of proposed § 5.727(a)(4)(ii) provides that if the veteran is readmitted after the first day of the seventh calendar month after the month of admission to hospital, domiciliary, or nursing home care, the readmission will be considered a new admission. Although this provision is not explicitly stated in part 3, it is based on current VA practice and is favorable to veterans.

Proposed § 5.727(b) would state the circumstances in which VA will not reduce Old-Law Pension while the veteran is receiving hospital, domiciliary, or nursing home care. The paragraph would include language from current § 3.551(a) and add two other exceptions based on long-standing VA practice. See the discussion above related to proposed § 5.722(b)(2) and (3) for more information concerning these exceptions to the general reduction rule.

Proposed § 5.727(c)(2)(i) is a new provision based on paragraph (a)(1) of 38 U.S.C. 3203 (the predecessor to current 38 U.S.C. 5503) as in effect on June 30, 1960, which provides that if a veteran is readmitted to VA hospitalization following an irregular

discharge from a prior VA hospitalization during which Old-Law Pension was reduced, Old-Law Pension will be reduced effective from the date of readmission. See Public Law 85–857, 72 Stat. 1105, 1234 (1958). That paragraph, as it pertains to Old-Law Pension, was amended by section 3 of Public Law 89–362, 80 Stat. 30 (1966), to limit the rule to readmissions that are within 6 months of the date of irregular discharge or release from the prior hospitalization.

Section 5.728 Reduction of Old-Law Pension or Section 306 Pension Based on the Need for Regular Aid and Attendance While a Veteran Is Receiving Hospital, Domiciliary, or Nursing Home Care

Proposed § 5.728 would provide for reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care. It is a plain language rewrite for clarity of the Old-Law Pension and Section 306 Pension provisions in current 38 CFR 3.501 and 3.552. VA intends no substantive change by this rewording.

As discussed above regarding § 5.724(b), the term “the pensionable disability” used in § 3.552(a)(2) refers to the disability for which the veteran is receiving regular aid and attendance under § 3.351(c)(1). There is no part 5 equivalent to § 3.351(c)(1) for either Old-Law Pension or Section 306 pension. Therefore, § 5.728(b)(1)(iii) would simply state the blindness criteria.

Current § 3.552(e) and (j) in part refer to a reduced rate of Section 306 Pension based on the need for regular aid and attendance that applies “if the veteran was age 78 or older on December 31, 1978.” There are no beneficiaries who fit this category as they would be at least 109 years old. Accordingly, similar references do not need to be carried forward to part 5.

Section 5.729 Resumption of Section 306 Pension and Section 306 Pension Based on the Need for Regular Aid and Attendance After a Veteran Is on Temporary Absence From Hospital, Domiciliary, or Nursing Home Care or Is Discharged or Released From Such Care

We propose to separate the provisions of current 38 CFR 3.556 into two new sections, § 5.729 for Section 306 Pension and § 5.730 for Old-Law Pension. We intend no substantive changes as a result of the separation. This would provide readers with a clear and organized description of the rules governing the resumption of Section 306

Pension and Old-Law Pension after the monthly pension rates are reduced under § 5.726, "Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care", or under § 5.727, "Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care." The proposed regulations will also address the resumption of pension based on the need for regular aid and attendance under these two pension programs when the benefit is reduced under § 5.728, "Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care."

Proposed § 5.729 would restate the portions of current § 3.556 that pertain to the resumption of benefits under the Section 306 Pension program after a veteran is on temporary absence, or is discharged or released from hospital, domiciliary, or nursing home care.

In § 3.556(c) and (e), the phrase "subject to prior payments" refers to the prior payments made at the reduced rate. It is implicit that VA will not make duplicative payments for these amounts when it resumes payment of the unadjusted (full) rate. Stating in only some regulations that VA makes payments subject to prior payments could cause confusion about the absence of that language in other regulations. For example, current § 3.556(a) does not contain the phrase "subject to prior payments"; whereas § 3.556(c) does contain the phrase. In order to avoid such confusion, we have not used this phrase in § 5.729 or § 5.730.

Proposed § 5.729(d)(2) contains one difference from current § 3.556(e). It addresses the effective date of the discontinuance of an apportionment following a regular discharge or release from hospital care. The current rule provides a later effective date if an overpayment to the apportionee would result under the general effective date rule. As explained by VA's General Counsel in VAOPGCPREC 74-90, 55 FR 43253 (Oct. 26, 1990), such an alternative date is impermissible. We have explained this more fully below in the discussion of proposed § 5.783. Therefore, we have not included the alternative effective date rule in proposed § 5.729(d)(2).

Section 5.730 Resumption of Old-Law Pension and Old-Law Pension Based on the Need for Regular Aid and Attendance After a Veteran Is on Temporary Absence From Hospital, Domiciliary, or Nursing Home Care or Is Discharged or Released From Such Care

Proposed § 5.730 would restate the portions of current 38 CFR 3.556 that pertain to Old-Law Pension. It would address the resumption of benefits under the Old-Law Pension program after a veteran is discharged or released from hospital, domiciliary, or nursing home care.

Other Changes to Hospital Reduction Rules

Finally, we would omit current 38 CFR 3.558 from proposed part 5 because it implements 38 U.S.C. 5503(b) as in effect prior to its repeal on December 27, 2001. *See* Public Law 107-103, § 204(a)(1), 115 Stat. 976, 990 (2001) (repealing 38 U.S.C. 5503(b) and redesignating former subsection 5503(d) as 5503(b)). It required VA to withhold benefits from certain incompetent veterans and provided for resumption of payment of those benefits under prescribed circumstances. Because VA no longer withholds benefits from incompetent veterans, current § 3.558 cannot apply to a claim to which part 5 would apply.

For consistency throughout part 5, we would not use the phrase "involving aid and attendance". We would use the phrase "based on the need for * * * aid and attendance", which is more accurate. For the same reason, part 5 would use the phrase "regular aid and attendance" rather than "aid and attendance".

Subpart M: Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries

Determining Eligibility for Apportionments

We propose to repeat the provisions of VA's current apportionment regulations (38 CFR 3.450-3.461) in part 5 with minimal changes because VA is currently reviewing its apportionment program to determine if the program can be improved. We expect that §§ 3.450-3.461 will be amended following that review. VA will then include these new rules in part 5.

Section 5.770 Apportionment Claims

Proposed § 5.770 is based on current 38 CFR 3.450. Paragraph (a)(2) of § 3.450 refers to apportioning the "compensation * * * payable to the surviving spouse". Paragraph (d) of

§ 3.450 states, "Any amounts payable for children under §§ 3.459, 3.460 and 3.461 will be equally divided among the children." The reference to "compensation" in § 3.450(a)(2) and the reference to § 3.459 in § 3.450(d) both pertain to the apportionment of death compensation. We propose not to refer to compensation payable to a surviving spouse in § 5.770. We also propose not to include an equivalent to current § 3.459 or any reference thereto. There are less than 300 beneficiaries currently receiving death compensation. Except for one small group of beneficiaries, death compensation is payable only if the veteran died prior to January 1, 1957. VA has not received a claim for death compensation in more than 10 years, and we do not expect to receive any claims for apportionment of death compensation. Dependency and indemnity compensation (DIC) is a much greater benefit than death compensation. VA automatically awards DIC rather than death compensation pending confirmation of the DIC election. *See* 38 CFR 3.702, "Dependency and indemnity compensation". Because of the small number of beneficiaries of death compensation and the unlikelihood of a claim for apportionment of such benefits, the provisions concerning death compensation do not need to be carried forward to part 5.

We propose not to include paragraph (f) of current § 3.450, which states, "Prior to release of any amounts[,] the relationship of the claimant and the dependency of a parent will be fully developed, and the necessary evidence secured." In every apportionment claim, VA must verify the relationships of all claimants and fully develop the claim for relevant evidence. Other proposed part 5 VA regulations would state how VA determines dependency (for example, RIN 2900-AL94, "Dependents and Survivors", 71 FR 55052, Sept. 20, 2006); therefore, there is no need to propose an equivalent to § 3.450(f).

We propose not to include paragraph (g) of current § 3.450, a cross reference to § 3.460, "Death pension", because it does not aid the reader's understanding of the apportionment process and is therefore unnecessary.

Section 5.771 Special Apportionments

Proposed § 5.771 restates current 38 CFR 3.451 and reorganizes the content for clarity. In particular, in § 5.771(a), we have clarified that the section applies without regard to any other apportionment provision not merely without regard to those apportionment provisions where hardship is shown. We have also clarified that § 5.774(b)

and (c), the part 5 equivalents to § 3.458(b) and (c), are exceptions to that rule. However, we have not limited the exception to only paragraphs (b) and (c) of § 5.774. We also included § 5.774(f), which is based on current §§ 3.458(f), 3.901(c), and 3.902(c). The statutory authority for apportionment based on hardship is 38 U.S.C. 5307 which provides, generally, that the specified benefits “may” be apportioned as prescribed by the Secretary. The permissive language of the apportionment statute indicates that Congress intended VA to have significant discretion to determine when an apportionment will be made. However, in exercising that discretionary authority, VA may not violate other statutes. The prohibitions on apportionment in § 5.774(f) are mandated by other statutes. See 38 U.S.C. 6103, 6104, and 6105.

Further, the phrase in § 3.451, “may be specially apportioned between the veteran and his or her dependents or the surviving spouse and children”, would have a second “between”, to read, “* * * between the veteran and his or her dependents or between the surviving spouse and a child”. The parallel structure clarifies that there are two sets of apportionment options.

Additionally, proposed § 5.771(b)(2) refers to the “net worth, income, and expenses” of the primary beneficiary and the apportionment claimants instead of referring to “other resources and income” as stated in § 3.451. This change reflects VA’s long-standing practice and helps VA accurately determine the extent of any hardship.

Section 5.772 Veteran’s Benefits Apportionable

Proposed § 5.772 is based primarily on current 38 CFR 3.452. In proposed § 5.772(a), we added the condition that “the veteran is not reasonably discharging his or her responsibility for the spouse’s or child’s support,” to be consistent with similar language in proposed § 5.770(a)(1)(ii).

Proposed § 5.772(c), is based on current § 3.454 as well as § 3.452(c). Current § 3.454 is essentially redundant of § 3.452(c). Although current § 3.454(a) specifies that if an incompetent veteran is receiving care in a government institution and is entitled to pension VA will pay \$25 per month as an institutional award and pay the balance of the pension to the veteran’s spouse or child or, if the veteran has no spouse or child but has a dependent parent, apportion pension to the dependent parent as a special apportionment. We have not included this specific information in § 5.772(c)

because it is obsolete. To the extent that § 3.454(a) provides that an institutional award is limited to \$25, it conflicts with 38 CFR 13.61, which does not limit the amount of such payments. (Section 13.61 is discussed further below in conjunction with proposed § 5.792.) To the extent that it provides that the balance of pension will be apportioned to a veteran’s spouse or child, it conflicts with proposed § 5.792(d), which is based on current § 3.852(c) and is discussed further below, which provides that the amount of the apportionment will be determined based on hardship. Because the amount of the institutional award is not fixed by regulation, VA determines the amount of the apportionment on a case-by-case basis. Finally, VA does not apportion a veteran’s pension to a dependent parent. A parent may not be a dependent for disability pension. Whereas a veteran receiving disability compensation may receive an additional allowance for dependent parents, Congress authorizes an increased maximum annual pension rate only for a spouse or child, not for a dependent parent. See 38 U.S.C. 1542.

We would also not include § 3.454(b)(2). To the extent that § 3.454(b)(2) is based on a reduction under current § 3.551(d) (reducing Improved Pension for veterans receiving care before February 1, 1990) it is unnecessary, as explained above with regard to proposed § 5.722. To the extent that § 3.454(b)(2) is purportedly based on a reduction under § 3.551(e), it is obsolete. VA no longer reduces Improved Pension to \$60 under current § 3.551(e). The \$60 was increased to \$90, effective February 1, 1990, by Public Law 101–237, section 111, 103 Stat. 2062, 2064–65 (1989).

Section 5.773 Veterans Disability Compensation

Proposed § 5.773 is based on current 38 CFR 3.453, which states, “Rates of apportionment of disability compensation, service pension or retirement pay will be determined under § 3.451.” “Service pension” is another term for Spanish-American War pension. We propose to not include this benefit in § 5.773 because there are only about 200 surviving beneficiaries receiving such pension and they are survivors of deceased veterans. It is very unlikely that VA will receive an apportionment claim from a dependent of one of these beneficiaries. “Retirement pay” refers to emergency officers’ retirement pay. There are no longer any veterans receiving this benefit. Therefore, we also propose not to include this benefit in § 5.773.

Section 5.774 Benefits Not Apportionable

Proposed § 5.774 is based on current 38 CFR 3.458. It would restate § 3.458, using plainer language and reorganized for clarity.

Paragraph (c) of § 3.458 states that VA will not apportion benefits “[f]or purported or legal spouse of the veteran if it has been determined that he or she has lived with another person and held herself or himself out openly to the public to be the spouse of such other person, except * * *” Under the apportionment statute 38 USC 5307 VA may not apportion benefits to a “purported” spouse, so the distinction between “purported” spouse and “legal” spouse is unnecessary. We therefore propose not to include such language in paragraph (c) of § 5.774.

Paragraph (d) of § 3.458 states that a veteran’s benefits may not be apportioned “[w]here the child of the disabled person has been legally adopted by another person, except the additional compensation payable for the child.” The exception in § 3.458(d) is limited to disability compensation and does not mention the additional dependency and indemnity compensation payable to a surviving spouse for the child. However, current § 3.58 states, “A child of a veteran adopted out of the family of the veteran either prior or subsequent to the veteran’s death is nevertheless a *child* within the meaning of that term as defined by § 3.57 and is eligible for benefits payable under all laws administered by the Department of Veterans Affairs.” Consistent with § 3.58, we propose to include “the additional dependency and indemnity compensation payable to a surviving spouse for the child” in the exception in § 5.774(d), which is otherwise derived from current § 3.458(d).

In proposed § 5.774(e)(2), we have included the relevant effective date provision based on current § 3.503(a)(2).

In proposed § 5.774(f), we have included a cross reference to the provisions on forfeiture for fraud (§ 5.676), treasonable acts (§ 5.677), and subversive activity (§ 5.678), which were published as proposed on May 31, 2006. See 71 FR 31056, 31064–66. Those proposed regulations contain the complete rules on forfeiture and apportionments when benefits have been forfeited. In proposed § 5.774(f)(1) we have combined the provisions contained in current §§ 3.458(f)(1), 3.901, and 3.902. Current § 3.458(f)(1) prohibits an apportionment for forfeitures declared before September 2, 1959, if a veteran’s dependent “is

determined by [VA] to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies." Current § 3.901 (forfeiture for fraud) and § 3.902 (forfeiture for treason), both permit apportionments to a beneficiary's dependents under certain circumstances if the forfeiture was declared prior to September 2, 1959, but prohibit an apportionment to any dependent who participated in the acts causing the forfeiture. Accordingly, proposed § 5.774(f)(1) states that benefits will not be apportioned to any beneficiary's dependent who is determined by VA to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies or who participated in the acts that caused forfeiture for fraud or treasonable acts.

Section 5.780 Eligibility for Apportionment of Pension

Proposed § 5.780 is based on current 38 CFR 3.460, regarding death pension. Proposed § 5.780 states that apportionment of Improved Death Pension will be based on proposed § 5.771, "Special apportionments." Because this same rule applies to disability pension, we propose to include it here. Part 3 does not contain a specific regulation to this effect for disability pension; however, the hardship standard in current § 3.451, "Special apportionments", applies "[w]ithout regard to any other provision regarding apportionment". To be consistent with § 5.770(a)(1)(ii), we included the condition that "the veteran is not reasonably discharging his or her responsibility for the spouse's or child's support".

Proposed § 5.780 would not include the second sentence of the introductory paragraph of current § 3.460. Although not apparent from the current regulation, this provision only applies to surviving spouses of Spanish-American War veterans. See 38 U.S.C. 1536(a) (stating that surviving spouses of Spanish-American War veterans will receive \$75 instead of \$70 if married to the veteran during the period of war). As discussed above regarding proposed § 5.773, we are not specifically including Spanish-American War pension in part 5. If an apportionment claim were to arise, we would adjudicate it under proposed § 5.771, "Special apportionments". We think that it is reasonable and appropriate that an apportionment claimant should be required to demonstrate hardship in order to receive an apportionment of nonservice-connected death pension.

Proposed § 5.780 would also not include the provisions in current § 3.460(a) regarding apportionment of death pension benefits payable to dependents of the Civil and Indian wars. There are only two individuals receiving VA death pension based on Civil War service and no individuals receiving benefits based on Indian Wars service. Because it is very unlikely that VA will receive an apportionment claim from one of these beneficiary's dependents, we propose not to include those provisions of current § 3.460(a). If an apportionment claim were to arise, we would adjudicate it under proposed § 5.771, "Special apportionments".

Section 5.781 Eligibility for Apportionment of a Surviving Spouse's Dependency and Indemnity Compensation

Proposed § 5.781 is based on current 38 CFR 3.461. We propose not to include the last sentence of current § 3.461(b)(1) in proposed § 5.781. This sentence limits apportionments such that "the surviving spouse's share will not be reduced to an amount less than 50 percent of that to which the surviving spouse would otherwise be entitled." This sentence is obsolete and was added in 1940 when the death compensation program did not allow for additional benefits for each child. There are now situations in which it would be fair and appropriate for VA to apportion more than 50 percent of a surviving spouse's dependency and indemnity compensation (DIC) award. For example, if there were five minor children, the additional benefit payable for the children (from December 1, 2008 through November 30, 2009) would be \$1,430 (\$286 multiplied by 5). If an apportionment of \$286 were awarded to each child, the total amount apportioned (\$1,430) would be more than 50 percent of the surviving spouse's award of \$2,584 (basic surviving spouse rate of \$1,154 plus the \$1,430 for the children). Therefore, we propose not to include the 50-percent limitation in proposed § 5.781.

We propose not to include § 3.461(b)(2) in proposed § 5.781. Paragraph (b)(2) of § 3.461 provides that, "The additional amount of aid and attendance, where applicable, will be added to the surviving spouse's share and not otherwise included in the computation." This provision is obsolete. In the DIC program, the dependents' allowances for children under age 18 are the same whether or not the surviving spouse is entitled to additional special monthly DIC for regular aid and attendance.

We also propose not to include current § 3.461(b)(3) in proposed § 5.781. Under that current rule, if a surviving spouse has elected to receive DIC instead of death compensation, the child's share of an apportionment will be either the rate prescribed by the Under Secretary for Benefits or the share that would have been payable as death compensation, but not more than the total DIC amount. There is no longer any circumstance in which the child's death compensation apportionment could be greater than the total DIC amount. The DIC rate, in all cases, will be greater than the death compensation rate. Therefore, the language is obsolete.

Section 5.782 Effective Date of Apportionment Grant or Increase

Proposed § 5.782 is based on current 38 CFR 3.400(e) and 3.665(f). Proposed paragraph (a) states the general rule that the effective date of an apportionment or an increased apportionment is the first day of the month after the month in which VA receives an apportionment claim or a claim for an increased apportionment. The first two exceptions to the general rule are based on the introduction of current § 3.400(e) stating, "On original claims, in accordance with the facts found." Proposed § 5.782(b)(1) provides the effective date of an apportionment award where a primary beneficiary has a claim for VA benefits pending on the date that VA receives an apportionment claim. Proposed § 5.782(b)(2) provides the effective date where an apportionment claim is received within one year of the award of benefits to the primary beneficiary and the dependant has not yet been established on the primary beneficiary's award. The effective date of the apportionment will be the same as the effective date of the primary beneficiary's award, if the apportionment claimant is otherwise shown to be entitled to an apportionment from that date.

Section 5.783 Effective Date of Apportionment Reduction or Discontinuance

Proposed § 5.783 is based on current 38 CFR 3.500(d), (g), and (n). Proposed § 5.783(a), based on current § 3.500(d)(1), provides the general effective date rule for discontinuance or reduction of an apportionment. As explained by VA's General Counsel in VAOPGCPREC 74-90, 55 FR 43253 (Oct. 26, 1990), current § 3.500(d)(1) means that VA should discontinue an apportionment effective the first day of the month following the date that the reason for the apportionment no longer exists. We propose not to include an

equivalent of § 3.500(d)(2) in proposed § 5.783. The rule from paragraph § 3.500(d)(2) has been described by the General Counsel, in VAOPGCPREC 74–90, as “constitutionally faulty” because it provides a later effective date if an overpayment would result by applying the general rule. As explained by the General Counsel, delaying the effective date for the administrative convenience of avoiding an overpayment deprives a veteran of VA benefits that Congress intended the veteran to have and causes such a veteran to receive a lesser amount of VA benefits than a veteran to whom the general rule could apply. With the exception eliminated, the remaining rule is the same as the general rule and unnecessary as a separate provision.

Paragraph (b) of proposed § 5.783 provides the most common exceptions to the general rule stated in proposed paragraph (a). Proposed paragraph (b)(3) explicitly states the principle, implied by VA’s current apportionment regulations, that when the primary benefit is discontinued, the apportionment is discontinued effective the same day. Proposed paragraph (b)(4) informs the reader that when a primary beneficiary is released from incarceration, the effective date of discontinuance of the apportionment will be set in accordance with § 5.815 or § 5.816.

Section 5.784 Special Rules for Apportioned Benefits on Death of Beneficiary or Apportioneer

Proposed § 5.784 is based on current 38 CFR 3.1000(b). In a prior proposed part 5 rulemaking—the portion concerning accrued benefits—we proposed § 5.563, “Special rules when a beneficiary dies while receiving apportioned benefits”, as the part 5 equivalent to current § 3.1000(b). That section was published as proposed on October 1, 2004. *See* 69 FR 59072, 59088. Because the rule relates more to apportionments than to accrued benefits, we would place this rule with the other apportionment rules instead of where it was previously proposed. Further, we have clarified how the payment of benefits in these circumstances relates to the payment of accrued benefits.

Proposed § 5.784(a) is based on § 3.1000(b)(2). We have clarified that the apportionment should be paid to the apportioneer and should not be treated as accrued benefits that were due to the deceased beneficiary. Further, we have included death benefits in § 5.784(a) even though § 3.1000(b)(2) applies only to apportionments of a veteran’s benefits. In practice, VA applies the rule

expressed in § 3.1000(b)(2) to death benefits as well.

Proposed § 5.784(b)(1) is based on current § 3.1000(b)(1), which provides that when a person receiving an apportioned share of a veteran’s benefits dies, all or any part of an unpaid apportionment is payable to the veteran or to the veteran’s surviving dependents. The current rule essentially repeats the broad authority given to VA under 38 U.S.C. 5121(a)(1); however, it does not specify how VA makes determinations concerning payment to survivors. Proposed § 5.784(b)(1), following long-standing VA practice, provides for payment of the unpaid apportionment to the veteran, if the veteran survives, or to the surviving dependents of a deceased veteran. We propose to use the same order of priority specified in 38 U.S.C. 5121(a)(2), which is applicable to accrued benefits due to the veteran to determine which dependents of a deceased veteran are entitled to these funds. This is accomplished through a cross reference to proposed § 5.551(b)(1), “Persons entitled to accrued benefits.” Section 5.551 was published as proposed on October 1, 2004. *See* 69 FR 59072, 59085–86. If there are no eligible claimants who are dependents, then under 38 U.S.C. 5121(a)(5), VA may pay the unpaid apportionment to reimburse the person who bore the expense of the deceased person’s last sickness or burial.

Proposed § 5.784(b)(2) is based on current § 3.1000(b)(3), which provides that when a child receiving an apportionment of a surviving spouse’s death benefits dies, then the unpaid apportionment is payable only as reimbursement to the person who bore the expense of the deceased child’s last sickness or burial. Current § 3.1000(b)(3) appears to conflict with current § 3.1000(a)(3), which provides that when a child beneficiary dies, then accrued benefits are payable to the surviving children of the veteran. Current § 3.1000(b)(3) is based on an outdated interpretation of the predecessor to 38 U.S.C. 5121(a). Prior to the establishment of the dependency and indemnity compensation (DIC) and Improved Pension programs, VA benefits were payable directly to a child only if there were no surviving spouse. Prior to the existence of those programs, the correct interpretation of the accrued benefits statute was that if there were a surviving spouse and the child apportioneer died, the only provision of the statute that could apply was that portion providing for payment as reimbursement of expenses of the last sickness or burial. *See* Administrator’s

Decision, Veterans Administration, No. 666 (Sept. 22, 1945). However, under the current VA benefits system, a surviving child may directly receive Improved Death Pension benefits and, if 18 years of age or older, DIC benefits. Therefore, it is illogical to continue to interpret 38 U.S.C. 5121(a)(4)—which provides for payment to the surviving children—as not applying merely because there is a current surviving spouse. Accordingly, in § 5.784(b)(2), we propose that upon the death of a child receiving an apportionment of a surviving spouse’s death benefits, the apportionment is first payable as accrued benefits to the veteran’s surviving child. If there is no surviving child claimant, only then are benefits payable to reimburse the person who bore the expense of the last sickness or burial of the apportioneer.

Incompetency and Payments to Fiduciaries and Minors

We propose to repeat the provisions of VA’s current fiduciary regulations (38 CFR 3.353, 3.355, and 3.850 through 3.857) in part 5 with minimal changes. We are doing this because VA is currently rewriting its fiduciary regulations (RIN 2900–AM90, “Fiduciary Activities”) to conform to the Veterans Benefits Improvement Act of 2004, Public Law 108–454, which increased protections for VA beneficiaries. *See* 118 Stat. 3612. Upon the completion of that rulemaking, we will incorporate the revised part 3 fiduciary regulations into part 5.

Section 5.790 Determinations of Incompetency and Competency

Proposed § 5.790 is based on current §§ 3.353 and 3.400(x) and (y). Proposed § 5.790(c) is based on current 38 CFR 3.353(c) which begins, “Unless the medical evidence is clear, convincing and leaves no doubt as to the person’s incompetency, the [agency of original jurisdiction] will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities.” The phrase “clear, convincing and leaves no doubt” is inconsistent with traditional legal evidentiary standards. Traditionally, “clear and convincing” is a distinct standard. “Leaves no doubt”, however, suggests a significantly higher standard. Further, if compared to the standard for conviction in a criminal case (“beyond a reasonable doubt”), “leaves no doubt” could be considered an even higher standard that is inconsistent with other areas of the law. Therefore, we are removing the term “leaves no doubt” and instead simply specifying a “clear

and convincing” standard. “Clear and convincing” is a high evidentiary standard that will permit VA to make a determination of incompetency without requesting an essentially unnecessary medical opinion. Further, the standard is sufficiently high to prevent unwarranted determinations of incompetency. *See Thomas v. Nicholson*, 423 F.3d 1279, 1283 (Fed. Cir. 2005) (“The ‘clear and convincing’ standard is ‘reserved to protect particularly important interests in a limited number of civil cases’ where there is a clear liberty interest at stake, such as commitment for mental illness, deportation, or denaturalization.”) (citations omitted).

Proposed paragraph (f) is the part 5 counterpart to current § 3.400(x) and (y).

In proposed § 5.790, we have updated references in current § 3.353—to §§ 3.102, 3.103, and 3.327(a)—to refer instead to their respective proposed part 5 counterparts—§§ 5.3(b)(2), 5.83, and 5.102. Proposed § 5.3(b)(2) was published on March 31, 2006. *See* 71 FR 16464, 16475. Proposed §§ 5.83 and 5.102 were published on May 10, 2005. *See* 70 FR 24680, 24687–88, 24689–90.

Section 5.791 General Fiduciary Payments

Proposed § 5.791 is based on current § 3.850. In proposed § 5.791(a), to be consistent with the statutory authority of 38 U.S.C. 5502(a)(1), we clarify that the phrase “regardless of any legal disability” applies only to any legal disability on the part of the beneficiary. Also, in order to ensure that readers are aware of fiduciary-related regulations located elsewhere in title 38, we have added a cross reference to part 13 at the end of § 5.791(a).

Proposed § 5.791(c) and (d) are based on current § 3.850(b) and (d) respectively. The part 3 rules are identical in substance to provisions in §§ 13.63 and 13.62 of part 13. In part 5, we propose to use the same language used in the part 13 regulations and provide cross references thereto in order to eliminate confusion about whether the slightly different phrasing between the part 3 regulations and the part 13 regulations is intended to convey a different meaning. Although the regulations are redundant, it is useful to VA personnel to have the same rules located in distinct parts of the CFR. VA’s adjudication personnel typically refer to part 3, whereas VA’s fiduciary personnel typically refer to part 13.

Proposed paragraph (e) of § 5.791 is the part 5 counterpart to current §§ 3.400(n) and 3.500(m).

Section 5.792 Institutional Awards

Proposed § 5.792(a) is based on current § 3.852(a), pertaining to payments to the chief officer of a facility housing an incompetent veteran. However, we propose to track language from 38 CFR 13.61 instead of tracking the current part 3 language. Under current § 3.852, institutional awards may be made only when no fiduciary has been appointed, when payments to an unsatisfactory fiduciary have been discontinued, or when a fiduciary is not furnishing funds required for the veteran’s comforts and desires. These conditions reflect limitations on VA’s statutory authority to appoint fiduciaries that existed prior to 1974. In 1974, Public Law 93–295 liberalized the provisions for payments to and appointment of fiduciaries. *See* Public Law 93–295, section 301, 88 Stat. 180, 183–84. Under § 13.61, an institutional award may be made if it would adequately provide for the veteran’s needs and eliminate the need for appointment of another fiduciary. Because VA’s authority to make an institutional awards is no longer limited to the circumstances provided in § 3.852(a), we propose that § 5.792(a) should reflect VA’s current practice as stated in § 13.61.

Current § 3.852(b) likewise no longer reflects current VA practice. Accordingly, in proposed § 5.792(b), which is based upon § 3.852(b), we have stated the current practice. Current § 3.852(b) contains obsolete monthly limits on amounts payable to chief officers of VA or non-VA institutions that house incompetent veterans. Those limits conflict with 38 CFR 13.61, which states that “all or part” of an institutionalized veteran’s award may be paid to the chief officer if certain conditions are met. Under § 13.61, the amount of an institutional award is based on a determination by the Veterans Service Center Manager regarding the amount necessary to provide for the veteran’s needs. We believe that is the appropriate standard for institutional awards, and we therefore would not repeat the monetary limits in § 3.852(b). Rather, in proposed § 5.792(b)(1), we refer to § 13.61.

Proposed § 5.792(b)(2) is based on the first sentence of § 3.852(d). We have included the rule as part of paragraph (b) of § 5.792 because, like the rest of § 5.792(b), it pertains to non-VA institutional awards.

In proposed § 5.792(b)(3), which is based upon § 3.852(b)(1), we would clarify that the paragraph applies to non-VA institutional awards to reflect current VA practice.

We propose not to include equivalents to § 3.852(b)(2) and (3) in part 5 because those provisions are obsolete. They state procedures necessary because of limits on the amount of institutional awards that, as discussed above, are obsolete. The procedures described in § 3.852(b)(2) and (3) are likewise obsolete.

We propose to include the second sentence of current § 3.852(d) as § 5.792(c) with only minor changes for readability.

Proposed § 5.792(d) is based on current § 3.852(c), which states, “Where there arises a situation as enumerated in paragraph (a)(1) of this section, apportionment to dependents will be under § 3.451.” Dependents may apply for an apportionment of any institutionalized incompetent veteran’s benefits and are not limited to the circumstances in § 3.852(a)(1). We therefore propose to state in § 5.792(d), “An institutionalized incompetent veteran’s benefits may be apportioned to his or her dependents under § 5.771, Special apportionments.”

Proposed paragraphs (e) and (f) are the part 5 counterparts to current §§ 3.401(d) and 3.501(j) respectively. We note that proposed § 5.792(e) provides the effective-date rule for payments to the chief officer of both VA and non-VA institutions and uses the phrasing of § 3.401(d)(2). In current, § 3.401, paragraph (d)(1) provides the effective-date rule for non-VA institutions, and paragraph (d)(2) provides the effective-date rule for VA institutions. Although paragraphs (d)(1) and (d)(2) are phrased differently, the rule provided in both is the same. Proposed § 5.792(e) follows the phrasing of § 3.401(d)(2) because that paragraph is clearer than § 3.401(d)(1).

Since the sections on incompetency and payments to fiduciaries and minors were written in 38 CFR parts 3 and 13, VA has established Pension Management Centers to process pension claims. The Pension Management Center Manager has the same authority as a Veterans Service Center Manager regarding these matters. We therefore propose to add “Pension Management Center Manager” to “Veterans Service Center Manager” in the following paragraphs: §§ 5.790(b)(2) and (b)(3), 5.791(a)(2)–(4), 5.792(a), and 5.794(a)(2) and (a)(3).

Section 5.793 Limitation on Payments for a Child

Proposed § 5.793 is based on current § 3.854. The second sentence of proposed § 5.793(a), stating that VA will retroactively pay the child any benefits that were not paid for a period before

the child attained the age of majority, is based on current § 3.403(a)(2).

Section 5.794 Beneficiary Rated or Reported Incompetent

Proposed § 5.794 is based on current § 3.855, “Beneficiary rated or reported incompetent.”

Section 5.795 Change of Name of Fiduciary

Proposed § 5.795 is a plain language restatement of current § 3.856, with changes to make the regulation gender-neutral.

We propose not to include paragraph (l) of current § 3.500 in part 5. This paragraph indicates that VA would suspend a payment because of a fiduciary’s name change and provides the effective date therefore. This provision is obsolete. It refers to § 3.856. When VA amended § 3.856 to remove the rule about suspending benefits, VA failed to amend § 3.500(l) accordingly. *See* VA Compensation and Pension Transmittal Sheet 203 (May 29, 1959).

Section 5.796 Child’s Benefits to a Fiduciary of an Incompetent Surviving Spouse

Proposed § 5.796 is a plain language restatement of current § 3.857.

Section 5.797 Testamentary Capacity for VA Insurance Purposes

Proposed § 5.797 is a plain language rewrite of current § 3.355, which involves the testamentary capacity of an insured to execute designations or changes of beneficiary or designations or changes of option. We also made the regulation gender-neutral.

Current § 3.355(c) begins, “Lack of testamentary capacity should not be confused with insanity or mental incompetence. An insane person might have a lucid interval during which he would possess testamentary capacity. On the other hand, a sane person might suffer a temporary mental aberration during which he would not possess testamentary capacity.” We propose to omit this guidance about the relationship between testamentary capacity and insanity or mental incompetence. Elsewhere in proposed part 5, we have substantially revised the definition of insanity from the current definition in § 3.354. *See* 71 FR 16464, 16468–69 (Mar. 31, 2006) (discussing the proposed definition of “insanity” in § 5.1); *see also* 69 FR 4820, 4830 (Jan. 30, 2004) (discussing use of “lack of mental capacity to contract” versus use of “insane” in proposed § 5.38). The guidance in § 3.355(c) is not essential to understanding and applying the general rule that there is a rebuttable

presumption that every insured person possesses testamentary capacity when performing a testamentary act. Given the proposed revisions to the definition of insanity, we have not included this additional guidance in proposed § 5.797(c). We believe that retaining the guidance from § 3.355(c) would only confuse readers about how to apply the general rule. At the end of proposed § 5.797(c), we have added a cross reference to the benefit-of-the-doubt rule in § 5.3(b)(2), which was published as proposed on March 31, 2006. *See* 71 FR at 16475. We believe that the cross reference will aid readers in understanding the last sentence of § 5.797(c), which states, “[R]easonable doubt should be resolved in favor of testamentary capacity.”

Section 5.798 Payment of Disability Compensation Previously Not Paid Because an Incompetent Veteran’s Estate Exceeded \$25,000

Proposed § 5.798 is based on current § 3.853(c). Under § 3.853, VA discontinued disability compensation to an incompetent veteran who had no dependents and had an estate that exceeded \$25,000. There are no part 5 equivalents to § 3.853(a) and (b). Paragraph (a) of § 3.853 limits the discontinuance of disability compensation to the period from November 1, 1990, through September 30, 1992. Part 5, as proposed, will not apply to the payment of benefits for that period. (Accordingly, we also propose not to include § 3.501(n), which provides the effective date for a discontinuance under § 3.856(a) in part 5.) Paragraph (b) of § 3.853 pertains to the resumption of benefits prior to October 1, 1992, and is likewise unnecessary. However, the first sentence of paragraph (c) of § 3.853 provides that disability compensation that has been withheld under § 3.853 must be paid to the veteran in a lump-sum if the veteran is subsequently rated competent for a continuous period of more than 90 days. It is possible that a veteran whose disability compensation was discontinued under § 3.853(a) and has not yet been paid under § 3.853(c) will regain competency for more than 90 days. Therefore, proposed § 5.798 provides for the lump-sum payment of that withheld disability compensation under such circumstances. We propose not to include the second sentence of § 3.853(c), which states, “However, a lump-sum payment shall not be made to or on behalf of a veteran who, within such 90-day period, dies or is again rated incompetent.” This sentence is unnecessary because, any veteran “who, within such 90-day period, dies or is

again rated incompetent” could not possibly satisfy the requirements of the first sentence of paragraph (c).

Payments to Incarcerated Beneficiaries

The next seven regulations in this NPRM include general provisions relating to payments to incarcerated beneficiaries. Throughout these seven regulations, we propose to use the term “incarcerated” rather than “imprisoned”. Although the relevant pension statute uses the term “imprisoned” (*see* 38 U.S.C. 1505) and the relevant compensation statute uses the term “incarcerated” (38 U.S.C. 5313), we have determined that the terms are synonymous. We propose to use “incarceration” because we believe it is the term more commonly used by the public.

Section 5.810 Incarcerated Beneficiaries—General Provisions and Definitions

Proposed § 5.810(a) defines terms for the purposes of the rules regarding incarcerated beneficiaries. Proposed paragraph (a)(1) defines the term “incarceration”. The first sentence of proposed § 5.810(a)(1) provides that confinement in a privately owned and privately managed penal institution pursuant to a contract with a Federal, State, or local unit of government will be considered to be “incarceration.” This clarification has become necessary because Federal, State, and local governments have become increasingly reliant on private contractors to provide prison services. In August 2006, VA’s General Counsel held that incarceration in a private facility under a contract with a State is incarceration in a “State penal institution”. VAOPGCPREC 5–2006, 72 FR 5801 (Feb. 7, 2007). Subsequently, the authorizing statutes, 38 U.S.C. 1505 and 5313, were amended from “Federal, State, or local penal institution” to “Federal, State, local, or other penal institution.” *See* Public Law 109–461, section 1002, 120 Stat. 3403, 3464–65 (Dec. 22, 2006).

The next sentence of proposed § 5.810(a)(1) describes types of internment not considered to be “incarceration” and is derived from current § 3.665(b). The current regulation defines the term “release from incarceration” and includes a list of programs within this definition. The list includes participation in a work release or halfway house program, parole, and completion of sentence. By defining participation in work release and similar programs as “release from incarceration”, the current rule implicitly excludes those programs from the definition of incarceration. Proposed

§ 5.810(a)(1) explicitly states that work release, parole, and residence in a halfway house are not included in the definition of incarceration. Proposed § 5.810(a)(1) includes residential re-entry centers. "Residential re-entry center" is a term now used by the Federal Bureau of Prisons as an alternative to the traditional term, "halfway house". See Federal Bureau of Prisons, Community Corrections, <http://www.bop.gov/locations/cc/index.jsp>.

The proposed rule also lists two forms of confinement that VA's General Counsel has determined are not "incarceration". First, we adopt the rationale set out in VAOPGCPREC 59-91, 56 FR 50149, 50151 (Oct. 3, 1991), holding that participating in a community control program is not incarceration. Second, the proposed rule codifies the holding of VA's General Counsel that a veteran is not subject to reduction of compensation and pension benefits under 38 U.S.C. 1505 and 5313 while the veteran is incarcerated in a foreign prison. VAOPGCPREC 10-2001, 66 FR 33309, 33313 (June 21, 2001). Although that General Counsel opinion only addressed veterans, its rationale would apply likewise to all beneficiaries whose benefits are subject to reduction or discontinuance because of incarceration. This is so because 38 U.S.C. 1505 and 5313 apply to any VA beneficiary who is incarcerated, not only to veterans.

Proposed paragraph (a)(2) defines the term "felony" and is derived from the definition contained in current § 3.665(b). Although the definitions of "incarceration" and "felony" are derived from current § 3.665, which pertains only to disability compensation, the proposed definitions would apply to pension, and dependency and indemnity compensation (DIC), as well as disability compensation. Current § 3.666, as it pertains to incarcerated beneficiaries and pension benefits, does not define "felony" or "incarceration". The definitions in current § 3.665 are generic, however, and in the interest of consistency and uniformity, we propose to apply them to compensation and to pension cases.

Proposed § 5.810(b) explains how to categorize foreign offenses and states that a felony includes an offense that is prosecuted by a foreign country if the offense is equivalent to a felony under the laws of the United States. Likewise, a misdemeanor includes an offense that is prosecuted by a foreign country if the offense is equivalent to a misdemeanor under the laws of the United States. This proposed paragraph is new and reflects an additional conclusion of

VA's General Counsel in VAOPGCPREC 10-2001 (discussed above regarding incarceration in a foreign prison). The General Counsel concluded that if a veteran is transferred to a Federal, State, or local penal institution in the United States to serve the remainder of a sentence for a foreign conviction of an offense that is equivalent to a felony (or a misdemeanor under 38 U.S.C. 1505) under the laws of the United States, then the veteran is thereafter subject to reduction of pension and compensation benefits under 38 U.S.C. 1505 and 5313. As explained above regarding incarceration in a foreign prison, although the opinion only addressed veterans, the rationale of the opinion would apply to all beneficiaries whose benefits are subject to reduction or discontinuance because of incarceration.

Proposed § 5.810(c) states that VA begins counting the 60-day period of incarceration that must precede a reduction under §§ 5.811 through 5.813 on the day after the beneficiary is convicted of a felony (or of a misdemeanor for pension). This explains that time served prior to conviction will not be considered as part of the 60-day period. In addition, paragraph (c) would state that VA begins counting the 60-day period even if the beneficiary is not sentenced on the same day that he or she is convicted, if the beneficiary is incarcerated as of that date, and that a new 60-day period begins on the first full day of reincarceration after a conditional release. This accords with 38 U.S.C. 1505 and 5313, which are concerned with the time spent imprisoned for a felony, or for a misdemeanor in pension cases, and not with the amount of time that the beneficiary is sentenced to serve. It also accords with VAOPGCPREC 3-2005, 72 FR 5801, 5802 (Feb. 7, 2007), and current VA policy.

Proposed § 5.810(d) is a new paragraph that explicitly states the requirement that claimants or beneficiaries inform VA if they are incarcerated. We think that this is logical, fair, and consistent with other current provisions that require claimants or beneficiaries to inform VA of changes in circumstances affecting entitlement to benefits. See § 3.652, "Periodic certification of continued eligibility", and § 3.660(a)(1), "Dependency, income and estate". In addition, enabling VA to adjust benefits promptly on the 61st day would be advantageous to claimants, beneficiaries, and VA because if benefits are not promptly adjusted, VA must

establish an overpayment and recoup the debt.

Proposed § 5.810(e) restates portions of current § 3.665(a) and the introductory language of current § 3.666 pertaining to notice to incarcerated beneficiaries regarding potential apportionees and conditions under which VA may resume benefits. We intend no substantive change.

Section 5.811 Limitation on Disability Compensation During Incarceration

Proposed § 5.811 pertains to the limitations on the amount of disability compensation payable to a veteran who has been incarcerated for more than 60 days following conviction of a felony.

Proposed § 5.811(a) restates current § 3.665(a) and (c), but where the current rule refers to a reduction of disability compensation, in part 5 we would refer to a "limit" on disability compensation, because the rule affects ongoing awards as well as awards of increased disability compensation based on increased disability. Moreover, because the amount of unpaid disability compensation may be apportioned, see § 5.814, it is not entirely accurate to characterize VA's actions as a "reduction". Finally, we also note that the applicable statute, 38 U.S.C. 5313, also uses the term "limitation". We intend no substantive change.

In a parenthetical sentence in § 5.811(a)(2), we propose to clarify that the limitation of payment amounts under that paragraph applies only to the payment of disability compensation after September 30, 1980.

Similarly, a parenthetical sentence in proposed § 5.811(a)(3) states that the payment limitation under paragraph (a)(3) applies only to the payment of disability compensation after March 31, 2002. This language incorporates the applicability date of Public Law 107-103, § 506(c), 115 Stat. 976, 996 (2001), which states, "This section shall apply with respect to the payment of compensation for months beginning on or after the end of the 90-day period beginning on the date of the enactment of this Act." The Act was enacted on December 27, 2001, the 90-day period from the date of enactment ended on March 26, 2002, and the first month thereafter was April 2002. No similar provision is shown in current § 3.665(c)(3). We are correcting this omission in part 5.

Proposed § 5.811(b) repeats current § 3.665(k) as it pertains to retroactive payments of disability compensation during incarceration.

Proposed § 5.811(c) states the maximum rates of disability compensation payable to an

incarcerated veteran. It is based on paragraphs (d) and (j) of § 3.665. Although current § 3.665 addresses increased disability compensation in § 3.665(j)(2) and existing or initial awards in § 3.665(d)(1) and (2), the resulting rate of payment is the same whether the award is an existing, initial, or increased award. VA will not pay veterans covered by this rule more than the 10-percent disability rate or one-half the 10-percent rate. To assist the reader, we propose to specify that for such veterans, the rate of disability compensation payable under 38 U.S.C. 1114(a) may not exceed the rate payable for a veteran rated 10 percent disabled.

In paragraph (c)(2), we propose to restate the parenthetical statement from current § 3.665(d)(2), “(even though the rate for 38 U.S.C. 1114(k) or (q) is paid)”, by stating that the rate provided in proposed (c)(2) applies “even if such a veteran is entitled to special monthly compensation under 38 U.S.C. 1114(k) or (q).” The parenthetical in current § 3.665(d)(2) clarifies that, even if a veteran with a disability rating of less than 20 percent is entitled to receive compensation in an amount equal to or greater than the 20 percent rate, the veteran’s rate of compensation would nevertheless be reduced under current § 3.665 (proposed § 5.811) to one-half the 10-percent rate. Such a situation could arise if a veteran with a disability rating of less than 20 percent were also entitled to special monthly compensation under 38 U.S.C. 1114(k) or (q). We have restated the language from the parenthetical to be clearer.

Current § 3.665(j)(3) pertains to additional circumstances in which VA will withhold increased disability compensation that is awarded to a veteran after he or she is incarcerated—generally, circumstances involving veterans who committed felonies before October 8, 1980, but were not incarcerated on October 1, 1980. Section 5313 specifies the circumstances under which VA may limit disability compensation to incarcerated veterans. Those circumstances are stated in proposed § 5.811(a). We are therefore not incorporating the provisions of § 3.665(j)(3) in part 5.

Section 5.812 Limitation on Dependency and Indemnity Compensation During Incarceration

Proposed § 5.812(a), derived from current § 3.665(a) and (c), states the general rule that VA will limit dependency and indemnity compensation (DIC) if the beneficiary has been incarcerated for more than 60 days following conviction of a felony. We have not included any reference to

death compensation in proposed § 5.812 or in proposed § 5.815, which pertains to the resumption of benefits and is also based on § 3.665. As explained above regarding proposed § 5.770, VA does not expect to receive any more claims for death compensation, and the provisions concerning death compensation do not need to be carried forward to part 5. Any action pertaining to death compensation will be processed or adjudicated under part 3.

In the second sentence of § 5.812(a)(2), we propose to clarify that the limitation of payment amounts under that paragraph applies only to the payment of DIC after September 30, 1980.

Proposed § 5.812(b), derived from current § 3.665(d)(3), establishes that VA will not pay DIC at a rate greater than one-half of the amount of disability compensation payable to a veteran rated 10 percent disabled. The current rule requires VA to pay that amount but does not recognize that one-half of the 10 percent disability compensation rate could be higher than the parents’ DIC rate. Therefore, the proposed rule clarifies that the rate cannot be “more than” one-half of the 10 percent disability compensation rate.

Proposed § 5.812(c), restates with no substantive changes current § 3.665(l) concerning parents’ DIC rates when one parent is incarcerated.

Proposed § 5.812(d) repeats current § 3.665(k) as it pertains to retroactive payments of DIC during incarceration.

Section 5.813 Discontinuance of Pension During Incarceration

Proposed § 5.813, derived from the first sentence and paragraph (d) of current § 3.666, pertains to the discontinuance of pension to or for a person who is incarcerated for more than 60 days following conviction of a felony or of a misdemeanor. No substantive changes are intended.

Section 5.814 Apportionment When a Primary Beneficiary is Incarcerated

Proposed § 5.814 addresses apportionment of benefits not paid to an incarcerated beneficiary. It is based on several provisions in current §§ 3.665 and 3.666. Proposed paragraph (a) restates in plain language the part 3 rules regarding notice. It is derived from the third sentence of current § 3.665(a) and from § 3.665(h), which apply to disability compensation and to dependency and indemnity compensation (DIC). Proposed § 5.814(a)(1) provides for VA notice to dependents of their potential entitlement to an apportionment and proposed paragraph (a)(2) provides for

VA notice to apportionees that VA immediately discontinues an apportionment when the primary beneficiary is released. Although current § 3.666, regarding pension, does not contain similar provisions, VA’s long-standing practice has been to provide the same notice when a beneficiary is incarcerated, regardless of the type of benefit. Accordingly, notice under proposed § 5.814(a) is provided regardless of whether the benefit is disability compensation, DIC, or pension.

Proposed paragraph (b) pertains to apportionments of disability compensation and DIC and is based on current § 3.665(e). The net worth of the apportionee claimants has been included as a factor in determining individual need. Net worth is not listed as a factor in current § 3.665(e); however, its inclusion in proposed § 5.814(b) will help VA determine individual need more accurately.

Proposed paragraph (c) restates current paragraphs (a)(1), (a)(2), and (a)(3) of current § 3.666 concerning apportionments of pension to a veteran’s spouse or child when the veteran is incarcerated. Section 9 of the Veterans’ Pension Act of 1959, Public Law 86–211, 73 Stat. 432, repealed Old-Law Pension and replaced it with Section 306 Pension, effective July 1, 1960. Public Law 95–588, 92 Stat. 2497 (1978), repealed Section 306 Pension and replaced it with Improved Pension, effective January 1, 1979. Under these changes in law, no one may become entitled under a pension program once it has been repealed. Therefore, VA can only apportion Old-Law Pension or Section 306 Pension to a dependent who was recognized by VA as a dependent while those pension programs were still in effect. We have stated this limitation in proposed paragraph (c). Further, we clarify that references in § 3.666(a)(2) and (3) to “death pension” refer to Improved Death Pension because VA does not make new eligibility or rate determinations for the repealed pension programs.

Proposed § 5.814(d) is based on current § 3.666(b)(1), (2), and (4). When a surviving spouse or child is incarcerated and thereby disqualified from receiving pension, an unincarcerated surviving spouse or child may receive the pension amount that would be payable to him or her if the incarcerated surviving spouse or child did not exist. See 38 U.S.C. 1505(c). Under 38 U.S.C. 1505(c), this payment is not characterized as an apportionment; however, the effective-date provisions of proposed §§ 5.814(e)

and 5.816(c) apply just as they would if the payment were an apportionment.

Proposed § 5.814(e) is based on current § 3.665(f) and paragraphs (a)(4) and (b)(3) of current § 3.666, which pertain to the effective date of apportionment of a beneficiary's unpaid disability compensation, DIC, or pension benefits. Note that the rule in current § 3.666(b)(3), pertaining to death pension, differs from the rule contained in current §§ 3.665(f), pertaining to disability compensation and DIC, and 3.666(a)(4), pertaining to disability pension. Therefore, proposed § 5.814(e)(2)(ii), pertaining to death pension, provides that the effective date of the apportionment is the 61st day of the primary beneficiary's incarceration following conviction if evidence of income is received no later than 1 year after the date of VA's request for the evidence; whereas, proposed § 5.814(e)(2)(i), pertaining to disability compensation, DIC, and disability pension, provides that the retroactive effective date applies only if a claim for an apportionment is received no later than 1 year after the notice to the incarcerated beneficiary required by proposed § 5.810(e) and if any necessary evidence is received no later than 1 year after the date it is requested by VA. The proposed rule is consistent with the effective dates provided in the respective part 3 provisions.

Additionally, proposed § 5.813(e)(3) would clarify that VA will not re-pay an apportionee any benefits already paid to an incarcerated primary beneficiary. This is the meaning of the phrase in the current part 3 paragraphs, "subject to payments made to the [primary beneficiary] over the same period". If VA paid the primary beneficiary a portion of payments that it should have paid the apportionee beginning on the effective date of the apportionment award and ending on the first day of the month that follows the month for which VA last paid the primary beneficiary, then the benefits are considered as having been paid to the apportionee. In this manner, the family unit retains appropriate benefits and the primary beneficiary's overpayment is lessened or in some cases eliminated. Recouping an overpayment from the incarcerated beneficiary to then pay the same funds to the beneficiary's family would impose an unnecessary administrative burden on VA. Proposed § 5.813(e)(3) is consistent with the purpose of 38 U.S.C. 1505 and 5313(b) of eliminating a double burden on the taxpayers because the incarcerated veteran is already being supported by government funds provided for the operation of the penal

institution. See VAOPGCPREC 3-2005, 72 FR 5801 (Feb. 7, 2007).

Section 5.815 Resumption of Disability Compensation or Dependency and Indemnity Compensation Upon a Beneficiary's Release From Incarceration

Proposed § 5.815 is derived from paragraphs (i) and (m) of current § 3.665 and pertains to resumptions of disability compensation or dependency and indemnity compensation (DIC) when a beneficiary is released from incarceration. Proposed paragraph (a) states that VA will resume payment to a beneficiary effective the date of release if VA is informed of the release less than 1 year after the date of release; otherwise, VA will resume payments effective the date VA is informed of the release. Proposed paragraph (a) states that VA will resume payments to the beneficiary upon release "if the beneficiary remains entitled * * *." This clause makes explicit an obvious point, which part 3 left implicit.

The rules in proposed § 5.815(a) are subject to proposed paragraphs (b) and (c), which pertain to resumption of benefits where benefits were apportioned during the beneficiary's incarceration.

Current § 3.665(i)(3) provides the rule for resumption of benefits when an apportionment has been made to a dependent parent. This rule differs from the rule in § 3.665(i)(2) for resumptions of benefits involving apportionments to a dependent spouse or child who has not been reunited with the incarcerated beneficiary. Section 3.665(i)(3) provides that an apportionment to a dependent parent made solely because the beneficiary is incarcerated will be discontinued after the veteran has been released from incarceration—essentially treating the parent as having been reunited with the released beneficiary, regardless of whether that is the case. Accordingly, in the introductory paragraphs of proposed § 5.815(b) and (c), we have stated that for purposes of those paragraphs, a dependent parent apportionee, receiving an apportionment under § 5.814(b), will be considered as having been reunited with the released beneficiary. No substantive change from current § 3.665(i)(3) is intended.

Section 5.816 Resumption of Pension Upon a Beneficiary's Release From Incarceration

Proposed § 5.816 governs the resumption of pension benefits when a beneficiary whose benefits were discontinued is released from incarceration. The proposed regulation

is derived from current § 3.666(c). We propose to make it clear that the beneficiary must show entitlement to the benefit for VA to resume it.

In proposed § 5.816(b), we provide rules for resumptions of disability pension involving apportionments. In proposed § 5.816(c), we provide separate rules for resumptions of death pension involving an allocation. In current § 3.666(c), the same rule describes both situations, but we believe that the separate paragraphs clarify that payments of death pension under § 5.814(d) may be made to a surviving spouse or surviving child who has entitlement to death pension that is independent from that of the incarcerated beneficiary. While it is appropriate to refer to the reduction or discontinuance of death pension, such a reference is confusing in the context of disability pension. For disability pension, the apportionment of pension will be discontinued, not reduced. Further, with regard to disability pension, slightly different rules apply because the veteran may elect disability compensation while incarcerated if he or she is dually entitled to pension and disability compensation. By providing separate paragraphs in the proposed rule, we intend to eliminate confusion over differences between disability pension and death pension.

Section 5.817 Fugitive Felons

Proposed § 5.817 restates in plain language current §§ 3.665(n) and 3.666(e), which implement 38 U.S.C. 5313B, prohibiting the payment of VA benefits based on the entitlement of a fugitive felon.

Proposed paragraph (a) would specify that the prohibition on payment of benefits to, for, or on behalf of fugitive felons applies to "Improved Pension", whereas § 3.666(e) states "pension" and "death pension". Accordingly, proposed § 5.817 would not bar payment of Old-Law Pension or Section 306 Pension. The authorizing statute precludes, in pertinent part, payment of any benefit under 38 U.S.C. chapter 15. VA construes the statute to mean current chapter 15, which authorizes the payment of Improved Pension. Old-Law Pension and Section 306 Pension are not benefits under current chapter 15. The proposed regulation accurately states current VA practice.

We propose not to include in part 5 current § 3.665(n)(4) or the identical definition from § 3.666(e)(4), which state, "For the purposes of paragraph (n) [or (e)] of this section, the term *dependent* means a spouse, surviving spouse, child, or dependent parent of a veteran." When combined with veterans,

this definition describes all potential beneficiaries and apportionees of compensation or pension benefits. Proposed § 5.817(a) is clear in providing, “VA will not pay or apportion disability compensation, dependency and indemnity compensation, or Improved Pension to, for, or on behalf of a person for any period during which that person is a fugitive felon.” Therefore, we do not think the definition of “dependent” is needed for the purposes of the fugitive felon regulation.

Non-Inclusion of Certain Part 3 Rules in Part 5

We now discuss current part 3 regulations or portions of regulations that we propose not to include in part 5. Before turning to a specific regulation, however, we describe two overall non-inclusions in part 5.

References to Emergency Officers’ Retirement Pay and Service Pension

Proposed part 5 would not include references to emergency officers’ retirement pay or to “retirement pay.” Emergency officers’ retirement pay is an obsolete World War I benefit. There are no longer any veterans receiving this benefit, and we propose not to include references to it in part 5. VA no longer pays a benefit called retirement pay.

Proposed part 5 would not include references to service pension. There are no known surviving veterans of the Spanish-American War.

All of Current § 3.851

We propose not to include in part 5 the provisions in current § 3.851, “St. Elizabeths Hospital, Washington, DC.” Under former 24 U.S.C. 191 *et seq.* and its implementing regulation, current § 3.851, current and former members of the Armed Forces who had become insane were to be admitted to St. Elizabeths Hospital, which was the only Federal hospital dedicated to the treatment of the insane. In 1984, Congress transferred the pertinent Federal duties relating to the treatment of persons institutionalized at St. Elizabeths to the District of Columbia. See Public Law 98–621, 98 Stat. 3369. The District of Columbia government was charged to fully assume those responsibilities no later than October 1, 1993. See 24 U.S.C. 225(b)(1). Because St. Elizabeths is no longer a Federal facility dedicated to the treatment of insane veterans, there is no longer any reason to provide specialized rules relating to care at St. Elizabeths. We now treat a veteran in that hospital as we would any other institutionalized veteran.

Endnote Regarding Amendatory Language

We intend ultimately to remove part 3 entirely, but we are not including amendatory language to accomplish that at this time. VA will provide public notice before removing part 3.

Paperwork Reduction Act of 1995

All collections of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) referenced in this proposed rule have existing OMB approval. No changes are made in these proposed rules to those collections of information.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed regulatory amendment will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed amendment would not affect any small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of §§ 603 and 604.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been

determined to be a significant regulatory action under the Executive Order because it is likely to result in a rule that may raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any 1 year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers and Titles

The Catalog of Federal Domestic Assistance program numbers and titles for this proposal are 64.102, Compensation for Service-Connected Deaths for Veterans’ Dependents; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death; 64.115, Veterans Information and Assistance; and 64.127, Monthly Allowance for Children of Vietnam Veterans Born with Spina Bifida.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on December 28, 2011, for publication.

List of Subjects in 38 CFR Part 5

Administrative practice and procedure, Claims, Disability benefits, Health care, Pensions, Veterans, Vietnam.

Dated: January 5, 2011.

William F. Russo,

*Director, Regulations Management,
Department of Veterans Affairs.*

For the reasons set forth in the preamble, VA proposes to amend 38 CFR part 5, as proposed to be added at 69 FR 4832, January 30, 2004, and as

amended at 73 FR 65223, October 31, 2008, as follows:

PART 5—COMPENSATION, PENSION, BURIAL, AND RELATED BENEFITS

1. Revise Subpart L, as proposed to be added at 73 FR 65223, October 31, 2008, to read as follows:

Subpart L—Payments and Adjustments to Payments

Hospital, Domiciliary, and Nursing Home Care Reductions and Resumptions

Sec.

- 5.720 Adjustments to special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.721 Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
- 5.722 Reduction of Improved Pension while a veteran is receiving domiciliary or nursing home care.
- 5.723 Reduction of Improved Pension while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility.
- 5.724 Reduction or discontinuance of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.725 Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
- 5.726 Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.727 Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.728 Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.
- 5.729 Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
- 5.730 Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.
- 5.731–5.739 [Reserved]

Subpart L—Payments and Adjustments to Payments

Hospital, Domiciliary, and Nursing Home Care Reductions and Resumptions

§ 5.720 Adjustments to special monthly compensation based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care

(a) *Definitions.* For purposes of this section and §§ 5.721 through 5.730:

(1) *Hospital care.* Except as provided in paragraphs (c)(1) and (f)(1) of this section, *hospital care* means treatment provided in a VA hospital or provided in any hospital at VA expense.

(2) *Domiciliary or nursing home care* means treatment provided in a VA domiciliary or nursing home or in any domiciliary or nursing home at VA expense.

Note to paragraphs (a)(1) and (2): When multiple types of care are referred to consecutively (for example, “hospital, domiciliary, or nursing home care”), VA will consider transfers between the different types of care as a continuous period of all such care.

(3) *Regular discharge or release* means a veteran, surviving spouse, or child is discharged or released at the order of a medical professional based on that professional’s opinion that there is no medical reason to continue care.

(4) *Irregular discharge or release* means a veteran, surviving spouse, or child is discharged or released for any of the following reasons:

- (i) Refusal to accept treatment;
- (ii) Neglect of treatment;
- (iii) Obstruction of treatment;
- (iv) Disciplinary reasons;
- (v) Refusal to accept transfer to another facility;

(vi) Leaving the facility against medical advice; or

(vii) Failure to return from unauthorized or authorized absence.

(5) *Temporary absence* means a veteran, surviving spouse, or child is placed on non-bed care status or authorized absence. A temporary absence is not a discharge or release. When calculating a period of temporary absence, VA includes the day on which the temporary absence begins.

(b) *Adjustment of special monthly compensation while receiving hospital, domiciliary, or nursing home care.* VA will discontinue special monthly compensation (SMC) payable because a veteran needs regular aid and attendance or a higher level of care if the veteran is admitted to hospital, domiciliary, or nursing home care and the veteran remains in such care on the

first day of the second calendar month after the date of admission. In such cases, VA will reduce SMC to a rate specified in paragraph (c) of this section. The effective date of the reduced rate of SMC will be the first day of the second calendar month after the date of admission. However, VA will make no reduction or discontinuance under this paragraph if:

(1) The rate of special monthly compensation payable would be the same with or without an award for regular aid and attendance; or

(2) An exception in paragraph (d) of this section applies.

(c) *Calculating reduction of the rate of special monthly compensation.* If appropriate under paragraph (b) of this section, VA will reduce a veteran’s SMC rate as follows:

(1) *Discontinuance of special monthly compensation under § 5.332.* VA will discontinue SMC paid under § 5.332, Additional allowance for regular aid and attendance under 38 U.S.C. 1114(r)(1) or for a higher level of care under 38 U.S.C. 1114(r)(2). For the purposes of this paragraph (c)(1), “hospital care” means treatment in any hospital, including a private hospital, at United States Government expense. The discontinuance required by this paragraph (c)(1) is made only for hospital care; it is not made for domiciliary or nursing home care. VA will also make a reduction under paragraph (c)(3) of this section, if the veteran’s circumstances meet any of those criteria.

(2) *Reduction of special monthly compensation under §§ 5.324 and 5.331.* VA will reduce the following payments to the rate payable under § 5.333, Special monthly compensation under 38 U.S.C. 1114(s):

(i) Special monthly compensation paid at the rate under § 5.324, Special monthly compensation under 38 U.S.C. 1114(l), if entitlement is based on the need for regular aid and attendance.

(ii) Special monthly compensation paid under § 5.331(d)(1) or (e)(1), Special monthly compensation under 38 U.S.C. 1114(p), because a veteran is entitled to the rate under § 5.324 based on the need for regular aid and attendance and has been awarded the intermediate or next higher rate based on additional disability that is independently ratable.

(3) *Reduction of special monthly compensation under § 5.330(e).* Special monthly compensation paid at the rate under § 5.330(e), Special monthly compensation under 38 U.S.C. 1114(o), based on the need for regular aid and attendance will be reduced as follows:

(j) If the veteran is entitled to the rate under § 5.324 both for the need for regular aid and attendance and for some other disability or combination of disabilities without considering any disabilities twice, then VA will reduce the special monthly compensation to the rate payable under § 5.326, Special monthly compensation under 38 U.S.C. 1114(m).

(ii) If the veteran is entitled to the rate under § 5.324 based on the need for regular aid and attendance and is entitled to the rate under § 5.326 without considering any disabilities twice, then VA will reduce the special monthly compensation to the rate payable under § 5.328, Special monthly compensation under 38 U.S.C. 1114(n).

(iii) If the veteran is entitled to the rate under § 5.324 based on the need for regular aid and attendance and is entitled to the rate under § 5.328 without considering any disabilities twice, then VA will not reduce the SMC rate payable under § 5.330.

(4) *Reduction of special monthly compensation under § 5.326(i)*. VA will reduce SMC paid under § 5.326(i) to the rate payable under § 5.324.

(5) *Additional disability compensation based on having dependents*. In addition to the rates specified in paragraphs (c)(1) through (c)(4) of this section, VA will pay the additional amount of disability compensation payable to a veteran for dependents if he or she is entitled to disability compensation based on disabilities evaluated at 30 percent or more disabling.

(6) *Additional ratings under § 5.323*. In addition to the rates specified in paragraphs (c)(1) through (c)(4) of this section, SMC under § 5.323, Special monthly compensation under 38 U.S.C. 1114(k), based on independently ratable disability, is payable subject to the statutory ceiling on the total amount of compensation specified in § 5.323(b).

(d) *Exceptions*. Except for the discontinuances required by paragraph (c)(1) and (f)(1) of this section, VA will not reduce or discontinue SMC under this section if the need for regular aid and attendance is caused by disability resulting from:

(1) Loss of use of both lower extremities and loss of anal and bladder sphincter control; or

(2) Hansen's disease.

(e) *Readmission after discharge or release*. (1) *Regular discharge or release*. If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, VA will consider the readmission to be a new admission subject to the provisions of paragraph (b) of this section.

(2) *Irregular discharge or release*. (i) *Readmission less than 6 months after a period of hospital, domiciliary, or nursing home care*. VA will pay a reduced rate of SMC under paragraph (c) of this section effective on the date of readmission if all of the following are true:

(A) SMC is reduced or discontinued under paragraph (b) of this section;

(B) The veteran is given an irregular discharge or release from hospital, domiciliary, or nursing home care; and

(C) The veteran is readmitted to hospital, domiciliary, or nursing home care less than 6 months after discharge or release.

(ii) *Readmission 6 months or more after a period of hospital, domiciliary, or nursing home care*. If a veteran described in paragraph (e)(2)(i)(A) and (B) of this section is readmitted to hospital, domiciliary, or nursing home care 6 months or more after discharge or release, VA will consider the readmission to be a new admission subject to the provisions of paragraph (b) of this section.

(f) *Entitlement to special monthly compensation based on the need for regular aid and attendance established while a veteran is receiving hospital, domiciliary, or nursing home care*. (1) If a veteran becomes entitled to SMC under § 5.332 while receiving hospital care effective on or after the date of admission into such care, then VA will not pay that benefit until the date of discharge or release from hospital care. This does not affect payments for periods prior to admission. For the purposes of this paragraph (f)(1), "hospital care" means treatment in any hospital, including a private hospital, at United States Government expense.

(2) If a veteran becomes entitled to SMC under any other provision of this part based on the need for regular aid and attendance while receiving hospital, domiciliary, or nursing home care effective on or after the date of admission into such care, then VA will pay reduced SMC under paragraphs (c)(2) through (c)(4) of this section unless entitlement is based on one of the exceptions in paragraph (d) of this section. This does not affect payments for periods prior to admission.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.721 Resumption of special monthly compensation based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) *Temporary absence from hospital, domiciliary, or nursing home care—* (1) *Temporary absence for 30 days or more*.

If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any payment reduced or discontinued under § 5.720. The effective date of the resumed payment is the date the temporary absence begins. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will reduce or discontinue special monthly compensation under § 5.720 effective the date that the veteran returns to such care.

(2) *Temporary absence for less than 30 days*. If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any payments reduced or discontinued under § 5.720. If the veteran is later discharged or released, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(b) *Discharge or release*. If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any payment reduced or discontinued under § 5.720 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.722 Reduction of Improved Pension while a veteran is receiving domiciliary or nursing home care.

(a) *General provisions—* (1) *Veterans affected*. Except as provided in paragraph (b) or (f) of this section, VA will reduce Improved Pension paid to a veteran who receives domiciliary or nursing home care continuously for 3 full calendar months or who receives such care along with hospital care, as provided in paragraph (e)(2) of this section, and who:

(i) Does not have a spouse or child; or

(ii) Is married or has a child but is receiving Improved Pension as a veteran without dependents.

(2) *Rate payable*. VA will reduce Improved Pension under this section to \$90 per month.

(3) *Effective date of reduction*. Except as provided in paragraph (f) of this section, a reduction under paragraph (a)(1) of this section will be effective on the first day of the fourth calendar month after the month of admission to domiciliary or nursing home care.

(b) *Exceptions*. VA will not reduce Improved Pension under this section if a veteran is:

(1) Receiving domiciliary or nursing home care for Hansen's disease;

(2) Maintained in a State soldiers' home;

(3) Receiving domiciliary or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741; or

(4) Receiving pension as a veteran without a dependent because it is reasonable that part of his or her child's net worth be consumed for the child's maintenance before the child can be established as a dependent. See § 5.414(e), Net worth determinations for Improved Pension.

(c) *Apportionment of benefits to a spouse.* Improved pension in excess of the \$90 may be apportioned to the veteran's spouse under § 5.772(c)(2)(ii), Veteran's benefits apportionable.

(d) *Readmission—(1) Less than 6 months after prior period of domiciliary or nursing home care.* If a veteran is readmitted to domiciliary or nursing home care less than 6 months after a period of domiciliary or nursing home care for which Improved Pension was reduced under this section, VA will reduce Improved Pension to \$90 per month effective the first day of the month after the month of readmission.

(2) *Six months or more after prior period of domiciliary or nursing home care.* If a veteran is readmitted 6 months or more after a period of domiciliary or nursing home care for which Improved Pension was reduced under this section, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(e) *Transfers—(1) Transfer from hospital care.* If a veteran is receiving hospital care and is transferred to domiciliary or nursing home care, VA will not consider the period of hospital care as domiciliary or nursing home care.

(2) *Transfers from domiciliary or nursing home care.* (i) If a veteran is transferred from domiciliary or nursing home care to hospital care then back to domiciliary or nursing home care, VA will consider the entire period as continuous domiciliary or nursing home care unless the period of hospital care exceeds 6 months.

(ii) If a veteran is transferred from domiciliary or nursing home care to hospital care and then dies while hospitalized, VA will consider the entire period as continuous domiciliary or nursing home care unless the period of hospital care exceeds 6 months.

(iii) VA will consider domiciliary or nursing home care completed on the date of transfer to hospital care if a

veteran is discharged or released from VA care after his or her hospital stay.

(iv) VA will consider domiciliary or nursing home care completed on the date of transfer to hospital care if the period of hospital care exceeds 6 months.

(f) *Nursing home care for a prescribed program of rehabilitation—(1) Delay in reduction.* The reduction required by this section for a veteran receiving nursing home care will be delayed for up to 3 additional calendar months after the first day of the fourth calendar month referred to in paragraph (a)(3) of this section, or the first day of the month following the month of readmission referred to in paragraph (d)(1), if the Under Secretary for Health, or his or her designee, certifies that the primary purpose for the veteran's additional period of nursing home care is to provide a prescribed program of rehabilitation, under 38 U.S.C. chapter 17, designed to restore the veteran's ability to function within the veteran's family and community.

(2) *Continued nursing home care for rehabilitation.* The delay in reduction may be extended beyond the 3-month period provided by paragraph (f)(1) of this section if both of the following are true:

(i) The veteran continues to receive nursing home care; and

(ii) The Under Secretary for Health, or his or her designee, certifies that the primary purpose for the veteran's continued nursing home care is to provide a prescribed program of rehabilitation, under 38 U.S.C. chapter 17, designed to restore the veteran's ability to function within the veteran's family and community.

(3) *Rehabilitation ends.* The veteran's Improved Pension will be reduced under this section effective the first day of the calendar month after the date on which the program of rehabilitation ends.

(g) *Entitlement to Improved Pension established while a veteran is receiving domiciliary or nursing home care.* If a veteran becomes entitled to Improved Pension while receiving domiciliary or nursing home care, VA will reduce pension, or pay a reduced rate of pension, in accordance with this section.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.723 Reduction of Improved Pension while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility.

(a) *General provision.* Until September 30, 2011, VA will reduce Improved Pension being paid to a veteran without a spouse or child, to a

surviving spouse without a child, or to a child, to \$90 per month when that veteran or surviving spouse is receiving Medicaid-covered care in a nursing facility. VA will not reduce Improved Pension under this section if a veteran is receiving Medicaid-covered care in a State home to which VA makes per diem payments under 38 U.S.C. 1741.

(b) *Effective date of reduction.* Except as provided in paragraph (c) of this section, the effective date of reduction of Improved Pension payments under this section will be the latest of:

(1) The first day of the month after the month in which Medicaid-covered care begins;

(2) The first day of the month after the month during which the 60-day period prescribed in § 5.83(b) expires; or

(3) The first day of the month after the month for which VA last paid benefits.

(c) *Willful concealment.* If a veteran, surviving spouse, or child willfully conceals information that would lead to a reduction of Improved Pension payments under this section, and VA subsequently reduces Improved Pension under this section, the effective date of the reduction will be the first day of the month after the month in which the willful concealment occurred. In such a case, the beneficiary will be liable for any payments in excess of \$90 per month made after the effective date of the reduction if the willful concealment prevented VA from reducing benefits during that period.

(d) *Entitlement to Improved Pension established while a veteran, surviving spouse, or child is receiving Medicaid-covered care in a nursing facility.* If a veteran, surviving spouse, or child described in paragraph (a) of this section becomes entitled to Improved Pension while receiving Medicaid-covered care in a nursing facility, then VA will not pay more than \$90 per month while he or she receives such care.

(Authority: 38 U.S.C. 5503(d))

§ 5.724 Reduction or discontinuance of Improved Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) *Reduction or discontinuance of Improved Pension.* (1) If a veteran who is receiving Improved Pension based on the rate for regular aid and attendance receives hospital, domiciliary, or nursing home care for at least 1 full calendar month, VA will pay Improved Pension based on the housebound rate.

(2) The resulting reduction or discontinuance of Improved Pension will be effective the first day of the

second calendar month after the date of admission.

(3) VA will not reduce or discontinue Improved Pension under this paragraph (a) if an exception in paragraph (b) of this section applies.

Cross Reference: §§ 5.400(b) and (c) for the housebound and regular aid and attendance rates; 5.722 for reductions of Improved Pension after 3 full calendar months of domiciliary or nursing home care.

(b) *Exceptions.* VA will not reduce or discontinue Improved Pension under this section if:

(1) The need for regular aid and attendance is caused by disability resulting from:

(i) Loss of use of both lower extremities and loss of anal and bladder sphincter control;

(ii) Hansen's disease; or

(iii) Blindness pursuant to § 5.390(b)(1) or (2); or

(2) The veteran is receiving hospital, domiciliary, or nursing home care for Hansen's disease.

(c) *Readmission after discharge or release—(1) Regular discharge or release.* If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(2) *Irregular discharge or release.* (i) If a veteran whose Improved Pension was reduced or discontinued under this section is readmitted to hospital, domiciliary, or nursing home care less than 6 months after an irregular discharge or release, then VA will pay Improved Pension based on the housebound rate effective on the date of the readmission.

(ii) If a veteran is readmitted to hospital, domiciliary, or nursing home care 6 months or more after an irregular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(d) *Entitlement to Improved Pension based on the need for regular aid and attendance established while a veteran is admitted to hospital, domiciliary, or nursing home care.* If a veteran who is admitted to hospital, domiciliary, or nursing home care becomes entitled to Improved Pension based on the need for regular aid and attendance, with an effective date on or after the date of admission, then VA will pay Improved Pension based on the housebound rate. VA will not reduce or discontinue benefits under this paragraph (d) if an exception in paragraph (b) of this section applies.

(Authority: 38 U.S.C. 501(a), 5503)

§ 5.725 Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) *Temporary absence from hospital, domiciliary, or nursing home care for 30 days or more—(1) Improved Pension based on the need for regular aid and attendance.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any payment discontinued under § 5.724. The effective date of the resumed payment is the date the temporary absence began. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will discontinue Improved Pension based on the need for regular aid and attendance under § 5.724 effective the date that the temporary absence ends.

(2) *Improved Pension. (i) General.* If a beneficiary is on temporary absence from any domiciliary or nursing home care facility, or a Medicaid-covered nursing facility, for 30 days or more, VA will resume any payment reduced under § 5.722 or § 5.723. The payment will be resumed at the rate that is appropriate based on the beneficiary's income. The effective date of the resumed payment is the date that the temporary absence began. If the beneficiary returns to such facility, then VA will reduce Improved Pension under § 5.722 or § 5.723 effective the date that the temporary absence ends.

(ii) *Apportionment of benefits to a spouse.* If benefits reduced under § 5.722 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the temporary absence began, unless it is determined that the apportionment will continue under § 5.771, Special apportionments.

(b) *Temporary absence for less than 30 days. (1) Improved Pension based on the need for regular aid and attendance.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any payments discontinued under § 5.724. If the veteran is later discharged or released from hospital, domiciliary, or nursing home care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(2) *Improved Pension.* If a beneficiary is on temporary absence from domiciliary care, nursing home care, or Medicaid-covered nursing facility care, for less than 30 consecutive days, VA will not resume any payments reduced

under § 5.722 or § 5.723. If the beneficiary is later discharged or released from domiciliary care, nursing home care, or Medicaid-covered nursing facility care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(c) *Discharge or release—(1) Improved Pension based on the need for regular aid and attendance.* If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any payment reduced or discontinued under § 5.724 effective the date the veteran is discharged or released. Payment will be resumed at the rate in effect before the reduction or discontinuance based on such care unless the evidence of record shows that a different rate is required.

(2) *Improved Pension.* If a beneficiary is discharged or released from domiciliary care, nursing home care, or Medicaid-covered nursing facility care, VA will resume any payment reduced under § 5.722 or § 5.723 effective the date the beneficiary is discharged or released. Payment will be resumed at the rate in effect before the reduction or discontinuance based on domiciliary care, nursing home care, or Medicaid-covered nursing facility care, unless the evidence of record shows that a different rate is required.

(3) *Apportionment of benefits to a spouse.* If benefits reduced under § 5.722 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the veteran is discharged or released from domiciliary or nursing home care, unless it is determined that the apportionment will continue under § 5.771, Special apportionments.

(Authority: 38 U.S.C. 5503)

§ 5.726 Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) *General provisions—(1) Veterans affected.* Except as provided in paragraph (b) of this section, VA will reduce Section 306 Pension paid to a veteran who receives hospital, domiciliary, or nursing home care continuously for 2 full calendar months and who:

(i) Does not have a spouse or child; or
(ii) Is married or has a child, but is receiving Section 306 Pension as a veteran without dependents.

(2) *Proof of dependents.* If VA requests evidence about a spouse or child but such evidence is not received before the effective date of the reduction, then VA will reduce the veteran's Section 306 Pension under this section on the basis of no dependents. If the evidence is received

within 1 year after the date of VA's request, VA will pay the full rate from the date of reduction.

(3) *Rate payable.* VA will reduce Section 306 Pension under this section to \$50 per month.

(4) *Effective date of reduction.* A reduction under paragraph (a) of this section will be effective on the first day of the third calendar month after the month of admission to hospital, domiciliary, or nursing home care.

(5) *Calculation of period.* For purposes of calculating continuous periods of hospital, domiciliary, or nursing home care under this section, authorized absences for periods of 96 hours or less will be included as periods of hospital, domiciliary, or nursing home care. For authorized absences for periods of more than 96 hours, the entire period will be excluded from the total number of days, but will not be considered a break in the continuous period of hospital, domiciliary, or nursing home care. Sixty total days of hospital, domiciliary, or nursing home care will be considered 2 calendar months of such care.

(b) *Exceptions.* VA will not reduce Section 306 Pension under this section if a veteran is:

(1) Receiving hospital, domiciliary, or nursing home care for Hansen's disease;

(2) Maintained in a State soldiers' home; or

(3) Receiving hospital, domiciliary, or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741.

(c) *Apportionment of benefits to a spouse.* Benefits in excess of the \$50 per month may be apportioned to the veteran's spouse under § 5.772(c)(2)(i), Veteran's benefits apportionable.

(d) *Readmission—(1) Less than 6 months after admission.* If a veteran is readmitted to hospital, domiciliary, or nursing home care less than 6 months after a period of hospital, domiciliary, or nursing home care for which Section 306 Pension was reduced under this section, VA will reduce Section 306 Pension effective the first day of the month after the month of readmission.

(2) *Six months or more after admission.* If a veteran is readmitted 6 months or more after a period of hospital, domiciliary, or nursing home care for which Section 306 Pension was reduced under this section, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(Authority: 38 U.S.C. 5503; Pub. L. 95–588, Sec. 306, 92 Stat. 2497)

§ 5.727 Reduction of Old-Law Pension while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) *General provisions—(1) Veterans affected.* Except as provided in paragraph (b) of this section, VA will reduce Old-Law Pension being paid to a veteran who has received hospital, domiciliary, or nursing home care continuously for 6 full calendar months and who does not have a spouse or child.

(2) *Proof of dependents.* If VA requests evidence about a spouse or child but such evidence is not received within 60 days, then VA will reduce the veteran's Old-Law Pension under this section on the basis of no dependents. If the evidence is received within 1 year after the date of VA's request, VA will pay the full rate from the date of reduction.

(3) *Rate payable.* VA will reduce Old-Law Pension under this section to either \$30 per month or 50 percent of the amount of Old-Law Pension otherwise payable to the veteran, whichever amount is greater.

(4) *Effective date of reduction—(i) General.* The effective date of reduction under paragraph (a) of this section is the first day of the seventh calendar month after the month of admission to hospital, domiciliary, or nursing home care. VA excludes any month (others than the month of admission) that contains an authorized absence from its calculation of the effective date.

(ii) *Effect of irregular discharge prior to reduction.* The reduction will be effective on that date even if a veteran is irregularly discharged or released from hospital, domiciliary, or nursing home care and is readmitted to such care before that effective date. If the veteran is readmitted after the first day of the seventh calendar month after the month of admission to hospital, domiciliary, or nursing home care, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(b) *Exceptions.* VA will not reduce Old-Law Pension under this section if a veteran is:

(1) Receiving hospital, domiciliary, or nursing home care for Hansen's disease;

(2) Maintained in a State soldiers' home; or

(3) Receiving hospital, domiciliary, or nursing home care in a State home and the only payment made by VA to the State for the State home is the per diem rate under 38 U.S.C. 1741.

(c) *Readmission—(1) Readmission after regular discharge or release.* If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, VA will

consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section unless the veteran was discharged or released for purposes of admission to another facility for hospital, domiciliary, or nursing home care.

(2) *Readmission after irregular discharge or release—(i) Less than 6 months after discharge or release.* If a veteran is readmitted to hospital, domiciliary, or nursing home care less than 6 months after being irregularly discharged or released from a prior period of hospital, domiciliary, or nursing home care for which Old-Law Pension was reduced under this section, VA will reduce Old-Law Pension effective the first day of the month after the month of readmission.

(ii) *Six months or more after discharge or release.* If a veteran is readmitted 6 months or more after being irregularly discharged or released from a prior period of hospital, domiciliary, or nursing home care for which Old-Law Pension was reduced under this section, the readmission will be considered a new admission subject to the provisions of paragraph (a) of this section.

(Authority: Pub. L. 95–588, Sec. 306, 92 Stat. 2497)

§ 5.728 Reduction of Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance while a veteran is receiving hospital, domiciliary, or nursing home care.

(a) *Reduction of Old-Law Pension or Section 306 Pension—(1)(i) Old-Law Pension.* If a veteran who is receiving Old-Law Pension at the regular aid and attendance rate (\$135.45 monthly) receives hospital, domiciliary, or nursing home care for at least 1 full calendar month, VA will reduce benefits to the housebound rate (\$100 monthly).

(ii) *Section 306 Pension—(A) General.* If a veteran who is receiving Section 306 Pension based on the regular aid and attendance rate receives hospital, domiciliary, or nursing home care for at least 1 full calendar month, VA will pay benefits based on the housebound rate. VA will reduce benefits by \$104 per month, which is the difference between the aid and attendance allowance (\$165) and the housebound allowance (\$61).

(B) *Reduced aid and attendance allowance.* If a veteran who is receiving Section 306 Pension at a reduced regular aid and attendance rate (under former 38 U.S.C. 521(d)(2), as in effect on December 31, 1978) receives hospital, domiciliary, or nursing home care for at least 1 full calendar month, VA will reduce benefits to \$61 per month.

(2) The resulting reduction of these benefits will be effective the first day of the second calendar month after the month of admission.

(3) VA will not reduce benefits under this paragraph (a) if an exception in paragraph (b) of this section applies.

Cross Reference: § 5.471 for the housebound and regular aid and attendance rates.

(b) *Exceptions.* VA will not reduce Old-Law Pension or Section 306 Pension under this section if:

(1) The need for regular aid and attendance is caused by disability resulting from:

(i) Loss of use of both lower extremities and loss of anal and bladder sphincter control;

(ii) Hansen's disease; or

(iii) 5/200 visual acuity or less in both eyes with corrective lenses or due to concentric contraction of the visual field to 5 degrees or less in both eyes; or

(2) The veteran is receiving hospital, domiciliary, or nursing home care for Hansen's disease.

(c) *Readmission after discharge or release*—(1) *Regular discharge or release.* If a veteran is readmitted to hospital, domiciliary, or nursing home care after a regular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(2) *Irregular discharge or release.* (i) If a veteran whose Old-Law Pension or Section 306 Pension was reduced under this section is readmitted to hospital, domiciliary, or nursing home care less than 6 months after an irregular discharge or release, then VA will reduce Old-Law Pension or Section 306 Pension based on the need for regular aid and attendance effective on the date of the readmission.

(ii) If a veteran is readmitted to hospital, domiciliary, or nursing home care 6 months or more after an irregular discharge or release, then VA will consider the readmission to be a new admission subject to the provisions of paragraph (a) of this section.

(Authority: 38 U.S.C. 501(a); Pub. L. 95-588, Sec. 306, 92 Stat. 2497)

§ 5.729 Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) *Temporary absence from hospital, domiciliary, or nursing home care for 30 days or more*—(1) *General.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30

days or more, VA will resume any Section 306 Pension payment reduced under § 5.726 or § 5.728. The effective date of the resumed payment is the date that the temporary absence begins. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will reduce Section 306 Pension effective the date that the temporary absence ends.

(2) *Apportionment of benefits to a spouse.* If benefits reduced under § 5.726 have been apportioned to a veteran's spouse, the apportionment will be discontinued on the day that the temporary absence begins, unless it is determined that the apportionment will continue under § 5.771, Special apportionments.

(b) *Temporary absence from hospital, domiciliary, or nursing home care for less than 30 days.* Except as provided in paragraph (c) of this section, if a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any Section 306 Pension payments reduced under § 5.726 or § 5.728. If the veteran is later discharged or released from hospital, domiciliary, or nursing home care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(c) *Adjustment based on need.* (1) If a veteran has been under hospital, domiciliary, or nursing home care for more than 6 months and the combined periods of absence from such care exceed a total of 30 days, VA will retroactively pay the amounts that were unpaid under § 5.726 during such temporary absences if:

(i) The director of the facility providing hospital, domiciliary, or nursing home care requests payment on behalf of a veteran; and

(ii) Payment is necessary to meet the veteran's financial needs.

(2) If the conditions in paragraph (c)(1) of this section are met, payment will be restored even if the veteran has not been discharged or released from hospital, domiciliary, or nursing home care.

(d) *Discharge or release*—(1) *General.* If a veteran is discharged or released from hospital, domiciliary, or nursing home care, VA will resume any Section 306 Pension payment reduced under § 5.726 or § 5.728 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required.

(2) *Apportionment of benefits to a spouse.* If benefits reduced under § 5.726 have been apportioned to a

veteran's spouse, the apportionment will be discontinued on the day that the veteran is discharged or released from hospital, domiciliary, or nursing home care, unless it is determined that the apportionment will continue under § 5.771, Special apportionments.

(Authority: 38 U.S.C. 5503; Pub. L. 95-588, Sec. 306, 92 Stat. 2497)

§ 5.730 Resumption of Old-Law Pension and Old-Law Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care.

(a) *Temporary absence from hospital, domiciliary, or nursing home care for 30 days or more.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for 30 days or more, VA will resume any Old-Law Pension payment reduced under § 5.727 or § 5.728. The effective date of the resumed payment for Old-Law Pension reduced under § 5.727 is the date of reduction. The effective date of the resumed payment for Old-Law Pension reduced under § 5.728 is the date the temporary absence begins. If the veteran returns to hospital, domiciliary, or nursing home care, then VA will reduce Old-Law Pension effective the date that the temporary absence ends.

(b) *Temporary absence from hospital, domiciliary, or nursing home care for less than 30 days.* If a veteran is on temporary absence from hospital, domiciliary, or nursing home care for less than 30 consecutive days, VA will not resume any Old-Law Pension payments reduced under § 5.727 or § 5.728. If the veteran is later discharged or released from hospital, domiciliary, or nursing home care, VA will retroactively pay the amounts that were unpaid during any such temporary absence.

(c) *Regular discharge or release.* If a veteran is regularly discharged or released from hospital, domiciliary, or nursing home care, VA will resume any Old-Law Pension payment reduced under § 5.727 or § 5.728 effective the date that the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required. VA will also pay any amounts that were unpaid during the veteran's hospital, domiciliary, or nursing home care.

(d) *Irregular discharge or release.* If a veteran is irregularly discharged or released from hospital, domiciliary, or nursing home care, VA will resume any

Old-Law Pension payment reduced under § 5.727 or § 5.728 effective the date the veteran was discharged or released. Payment will be resumed at the rate in effect before the reduction based on hospital, domiciliary, or nursing home care, unless the evidence of record shows that a different rate is required. If a veteran's irregular discharge or release is not changed to a regular discharge or release, VA will not pay any Old-Law Pension that was unpaid during the veteran's hospital, domiciliary, or nursing home care until 6 months after the date the veteran was discharged or released.

(Authority: Pub. L. 95-588, Sec. 306, 92 Stat. 2497)

§ 5.731-5.739 [Reserved]

2. Add subpart M to read as follows:

Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries

Determining Eligibility for Apportionments

Sec.

- 5.770 Apportionment claims.
- 5.771 Special apportionments.
- 5.772 Veteran's benefits apportionable.
- 5.773 Veterans disability compensation.
- 5.774 Benefits not apportionable.
- 5.775-5.779 [Reserved]
- 5.780 Eligibility for apportionment of pension.
- 5.781 Eligibility for apportionment of a surviving spouse's dependency and indemnity compensation.
- 5.782 Effective date of apportionment grant or increase.
- 5.783 Effective date of apportionment reduction or discontinuance.
- 5.784 Special rules for apportioned benefits on death of beneficiary or apportionee.
- 5.785-5.789 [Reserved]

Incompetency and Payments to Fiduciaries and Minors

- 5.790 Determinations of incompetency and competency.
- 5.791 General fiduciary payments.
- 5.792 Institutional awards.
- 5.793 Limitation on payments for a child.
- 5.794 Beneficiary rated or reported incompetent.
- 5.795 Change of name of fiduciary.
- 5.796 Child's benefits to a fiduciary of an incompetent surviving spouse.
- 5.797 Testamentary capacity for VA insurance purposes.
- 5.798 Payment of disability compensation previously not paid because an incompetent veteran's estate exceeded \$25,000.
- 5.799-5.809 [Reserved]

Payments to Incarcerated Beneficiaries

- 5.810 Incarcerated beneficiaries—general provisions and definitions.
- 5.811 Limitation on disability compensation during incarceration.
- 5.812 Limitation on dependency and indemnity compensation during incarceration.

- 5.813 Discontinuance of pension during incarceration.
- 5.814 Apportionment when a primary beneficiary is incarcerated.
- 5.815 Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration.
- 5.816 Resumption of pension upon a beneficiary's release from incarceration.
- 5.817 Fugitive felons.
- 5.818-5.819 [Reserved]

Authority: 38 U.S.C. 501(a) and as noted in specific sections.

Subpart M—Apportionments to Dependents and Payments to Fiduciaries and Incarcerated Beneficiaries

Determining Eligibility for Apportionments

§ 5.770 Apportionment claims.

(a) *General*—(1) *Veteran*. All or part of the pension or disability compensation payable to any veteran may be apportioned:

(i) For his or her spouse, child, or dependent parents if the veteran is incompetent and is being furnished hospital treatment, nursing home, or domiciliary care by the United States, or any political subdivision thereof.

(ii) If the veteran is not residing with his or her spouse, or if the veteran's child is not residing with the veteran and the veteran is not reasonably discharging his or her responsibility for the spouse's or child's support.

(2) *Surviving spouse*. Where a child of a deceased veteran is not living with the veteran's surviving spouse, the dependency and indemnity compensation (DIC) or pension otherwise payable to the surviving spouse may be apportioned.

(b) *Apportionment to a child on active duty*. Except as provided in § 5.774(e)(2), no apportionment of disability or death benefits will be made or changed solely because a child has entered active duty.

(c) *Apportionment if beneficiary providing for dependents*. No apportionment will be made where the veteran, the veteran's spouse when paid "as wife" or "as husband", surviving spouse, or fiduciary is providing for dependents. The additional benefits for such dependents will be paid to the veteran, spouse, surviving spouse, or fiduciary.

(d) *Apportionment of death benefits*. Any amounts payable for children under §§ 5.780, Eligibility for apportionment of pension, and 5.781, Eligibility for apportionment of a surviving spouse's dependency and indemnity compensation, will be equally divided among the children.

(e) *Apportionment to a child not residing with surviving spouse*. The amount payable for a child in custody of and residing with the surviving spouse shall be paid to the surviving spouse. Amounts payable to a surviving spouse for a child in his or her custody but residing with someone else may be apportioned if the surviving spouse is not reasonably contributing to the child's support.

(Authority: 38 U.S.C. 5307, 5502(d))

§ 5.771 Special apportionments.

(a) *General*. Without regard to any provision regarding apportionment other than § 5.774(b), (c), and (f), where hardship is shown to exist, pension, disability compensation, or dependency and indemnity compensation may be specially apportioned between the veteran and his or her dependent or between the surviving spouse and a child. Such an apportionment will be based on the facts in the individual case. The apportionment may not cause undue hardship to the other persons in interest.

(b) *Factors that determine a special apportionment*. In determining the basis for special apportionment, consideration will be given to such factors as:

(1) The amount of VA benefits payable;

(2) The net worth, income, and expenses of the beneficiary and any dependent on whose behalf apportionment is claimed; and

(3) The special needs of the veteran, his or her dependent, and the apportionment claimant.

(c) *Apportioned amount*. The amount apportioned should generally be consistent with the total number of dependents involved. Ordinarily, apportionment of more than 50 percent of the veteran's benefits would constitute undue hardship while apportionment of less than 20 percent of his or her benefits would not provide a reasonable amount for any apportionee.

(Authority: 38 U.S.C. 5307)

§ 5.772 Veteran's benefits apportionable.

A veteran's benefits may be apportioned:

(a) *General*. If the veteran is not residing with his or her spouse or his or her child, the veteran is not reasonably discharging his or her responsibility for the spouse's or child's support, and a claim for apportionment is filed by or for the spouse or child.

(b) *Pending appointment of fiduciary*. Pending the appointment of a guardian or other fiduciary.

(c) *Veteran receiving hospital, domiciliary, or nursing home care*—(1)

Incompetent veteran—(i) *Spouse or child*. Where an incompetent veteran without a fiduciary is receiving hospital treatment, nursing home, or domiciliary care provided by the United States or a political subdivision, his or her benefit may be apportioned for a spouse or child unless such benefit is paid to a spouse (“as wife” or “as husband”) for the use of the veteran and his or her dependents.

(ii) *Dependent parent*. Where an incompetent veteran without a fiduciary is receiving hospital treatment, nursing home, or domiciliary care provided by the United States or a political subdivision, his or her disability compensation may be apportioned for a dependent parent, unless such benefit is paid to a spouse (“as wife” or “as husband”) for the use of the veteran and his or her dependents.

(2) *Competent veteran*—(i) *Section 306 Pension*. Where the amount of Section 306 Pension payable to a married veteran is reduced to \$50 monthly under § 5.726, Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care, an apportionment may be made to such veteran’s spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between \$50 and the total amount of pension payable on December 31, 1978.

(ii) *Improved Pension*. Where the amount of Improved Pension payable to a married veteran under 38 U.S.C. 1521(b) is reduced to \$90 monthly under § 5.722, Reduction of Improved Pension while a veteran is receiving domiciliary or nursing home care, an apportionment may be made to such veteran’s spouse upon an affirmative showing of hardship. The amount of the apportionment generally will be the difference between \$90 and the rate payable if pension were being paid under 38 U.S.C. 1521(c), including the additional amount payable under 38 U.S.C. 1521(e) if the veteran is so entitled.

(d) *Apportionment of additional disability compensation for dependent parent*. Where additional disability compensation is payable for a parent and the veteran or his or her guardian neglects or refuses to contribute such an amount to the support of the parent, the additional disability compensation will be paid to the parent upon receipt of a claim.

(Authority: 38 U.S.C. 501(a), 5307, 5502, 5503(a); Pub. L. 95–588, Sec. 306, 92 Stat. 2497)

Cross Reference: §§ 5.711, Payment to dependents due to the disappearance of a veteran for 90 days or more; 5.722, Reduction of Improved Pension while a veteran is receiving domiciliary or nursing home care; 5.725, Resumption of Improved Pension and Improved Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care; 5.726, Reduction of Section 306 Pension while a veteran is receiving hospital, domiciliary, or nursing home care; 5.729, Resumption of Section 306 Pension and Section 306 Pension based on the need for regular aid and attendance after a veteran is on temporary absence from hospital, domiciliary, or nursing home care or is discharged or released from such care; 5.792, Institutional awards; 5.814, Apportionment when a primary beneficiary is incarcerated.

§ 5.773 Veterans disability compensation.

Rates of apportionment of disability compensation will be determined under § 5.771.

§ 5.774 Benefits not apportionable.

Benefits will not be apportioned:

(a) If the total benefit payable does not permit payment of a reasonable amount to any apportionee.

(b) If a court of proper jurisdiction has found the veteran’s spouse guilty of adultery.

(c) If VA determines that the veteran’s spouse has lived with another person and has openly held himself or herself out to the public to be the spouse of that person unless:

(1) The spouse subsequently reconciled with the veteran and later became estranged from the veteran; or

(2) The spouse had entered into the relationship with the other person in good faith. For purposes of this paragraph (c)(2), “good faith” means that the spouse had a reasonable basis to believe that the marriage to the veteran was legally terminated (for example, due to trickery on the part of the veteran).

(d) If another person legally adopts a veteran’s child, except VA may apportion the additional disability compensation payable to a veteran for the child or the additional dependency and indemnity compensation payable to a surviving spouse for the child.

(e)(1) If the apportionment is claimed for a child who is on active duty.

(2) If a child is receiving apportioned benefits directly and then enters active duty. The apportionment will be discontinued and such benefits will be

paid to the veteran. The effective date of the discontinuance will be the first day of the month after the month for which VA last paid the apportionment.

Note to paragraph (e)(2): In accordance with § 5.770(b), if a child is included in an existing apportionment to an estranged spouse and then enters active duty, no adjustment in the apportioned award will be made based on the child’s entry into service.

(f)(1) To any beneficiary’s dependent who:

(i) Is determined by VA to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies; or

(ii) Participated in the acts that caused forfeiture for fraud or treasonable acts.

(2) If, after September 1, 1959, benefits were forfeited for fraud, treasonable acts, or subversive activity.

Cross Reference: §§ 5.676, Forfeiture for fraud, 5.677, Forfeiture for treasonable acts, and 5.678, Forfeiture for subversive activity.

(g) Unless the estranged spouse of a veteran files a claim for an apportionment. If there is a child of the veteran not in his or her custody, an apportionment will not be authorized unless a claim for an apportionment is filed by or for the child.

(Authority: 38 U.S.C. 5307, 6103(b), 6104(c), 6105(a))

§§ 5.775–5.779 [Reserved]

§ 5.780 Eligibility for apportionment of pension.

(a) *Disability pension*. Disability pension will be apportioned to the veteran’s spouse or child, if the veteran is not residing with his or her spouse, or if the veteran’s child is not residing with the veteran, and the veteran is not reasonably discharging his or her responsibility for the spouse’s or child’s support. Apportionment of these benefits will be made under § 5.771, Special apportionments.

(b) *Death pension*—(1) *Old-Law Death Pension or Section 306 Death Pension*. Old-Law Death Pension or Section 306 Death Pension will be apportioned to a child of a deceased veteran who is not in the custody of the surviving spouse. Apportionment of these benefits will be made at the rates approved by the Under Secretary for Benefits except when the facts and circumstances in a case warrant apportionment under § 5.771, Special apportionments.

(2) *Improved Death Pension*. Improved Death Pension will be apportioned to the veteran’s child if a child of the deceased veteran is not in the custody of the surviving spouse. Apportionment of these benefits will be

made under § 5.771, Special apportionments.

(Authority: 38 U.S.C. 5307)

§ 5.781 Eligibility for apportionment of a surviving spouse's dependency and indemnity compensation.

(a) *Conditions under which apportionment may be made.* The surviving spouse's award of dependency and indemnity compensation (DIC) will be apportioned where there is a child under 18 years of age and not in the custody of the surviving spouse. The surviving spouse's award of DIC will not be apportioned under this paragraph (a) for a child over the age of 18 years.

(b) *Rates payable.* The DIC share for each child under 18 years of age, including those in the surviving spouse's custody as well as those who are not in such custody, will be the additional allowance payable for each dependent child, except when the facts and circumstances in a case warrant special apportionment under § 5.771, Special apportionments. Current and historical DIC rates can be found on the Internet at <http://www.va.gov> or are available from any Veterans' Service Center. The share for the surviving spouse will be the difference between the children's share and the total amount payable.

§ 5.782 Effective date of apportionment grant or increase.

(a) *General rule.* Except as provided in paragraph (b) of this section, the effective date of an apportionment or an increased apportionment is the first day of the month after the month in which VA receives an apportionment claim or a claim for an increased apportionment.

(b) *Exceptions to general rule—(1) Claim for VA benefits is pending.* This paragraph (b)(1) applies if a veteran or surviving spouse (primary beneficiary) has a claim for VA benefits pending on the date that VA receives an apportionment claim. If the primary beneficiary's claim is granted, then the effective date of the apportionment will be the same as the effective date of the primary beneficiary's award, if the apportionment claimant is otherwise shown to be entitled to an apportionment from that effective date.

(2) *Apportionment claimant not yet established as the beneficiary's dependent.* This paragraph (b)(2) applies if VA receives an apportionment claim within 1 year of the award of benefits to the primary beneficiary and the apportionment claimant has not been established as a dependent on the primary beneficiary's award. The effective date of the apportionment will be the same as the effective date of the

primary beneficiary's award, if the apportionment claimant is otherwise shown to be entitled to an apportionment from that effective date.

(3) *Veteran's or surviving spouse's benefits are reduced or discontinued.* Except as provided in paragraph (b)(4) of this section, this paragraph (b)(3) applies if a veteran's or surviving spouse's benefits have been reduced or discontinued but an apportionment of the benefits that would otherwise be payable to the primary beneficiary is authorized. In this situation, the effective date of the apportionment is the same as the date on which the primary beneficiary's benefits were reduced or discontinued, if VA receives the apportionment claim within 1 year after that date and the apportionment claimant is otherwise shown to be entitled to an apportionment from that date.

(4) *The primary beneficiary is incarcerated.* The effective date of an apportionment or increased apportionment when the primary beneficiary is incarcerated is specified in § 5.814(e), Apportionment when a primary beneficiary is incarcerated.

(Authority: 38 U.S.C. 501(a), 5110)

§ 5.783 Effective date of apportionment reduction or discontinuance.

(a) *General rule.* Except as otherwise provided in this part, if VA reduces or discontinues an apportionment because the basis for the apportionment no longer exists, then the effective date of the reduction or discontinuance will be the first day of the month after the month in which the basis for the apportionment ceased to exist.

(b) *Exceptions to general rule.* (1) *Death, divorce, or marriage of an apportionnee.* The effective date of discontinuance of an apportionment due to the death, divorce, or marriage of the apportionnee is the first day of the month of the event, except the effective date of discontinuance of an apportionment of Old-Law Pension or Section 306 Pension will be January 1 of the calendar year immediately after the event.

Note to paragraph (b)(1): The effective date of discontinuance of the dependency allowance on the primary beneficiary's award due to the death, divorce, or marriage of the apportionnee is determined in accordance with § 5.184, Effective dates for reductions or discontinuances based on changes in dependency status, or § 5.477, Effective dates for Old-Law Pension and Section 306 Pension reductions or discontinuances.

(2) *Death or marriage of dependent of apportionnee.* The effective date of discontinuance of an apportionment due to the death or marriage of a child

included in an existing apportionment to an estranged spouse or another custodian of the child is the first day of the month after the month of the event.

(3) *Primary beneficiary dies or entitlement ends.* The effective date of discontinuance of an apportionment because the primary beneficiary dies or loses entitlement to the primary benefit is the same effective date that applies to the discontinuance of the primary benefit.

(4) *Primary beneficiary no longer incarcerated.* The effective date of discontinuance or reduction of an apportionment because the primary beneficiary is no longer incarcerated is specified in § 5.815 or § 5.816, depending on the primary benefit being apportioned.

(Authority: 38 U.S.C. 501(a), 5112)

§ 5.784 Special rules for apportioned benefits on death of beneficiary or apportionnee.

(a) *Payment to person receiving apportionment when the beneficiary dies.* If an apportionment has not been paid and the beneficiary dies, then VA will pay the apportionnee the unpaid apportionment through the first day of the month of the beneficiary's death. Except as provided in paragraph (b) of this section, the unpaid apportionment is not subject to payment as accrued benefits.

(b) *Person receiving apportioned share of VA benefits dies—(1) Receiving apportionment of veteran's benefits.* If a person receiving an apportionment of a veteran's benefits dies, then VA will pay any unpaid apportionment to the veteran, if living. If the veteran is not living, then the unpaid apportionment is payable only as accrued benefits to dependents of the veteran, under § 5.551(b)(1), Persons entitled to accrued benefits. If there is no eligible dependent claimant, then the unpaid apportionment is payable only as accrued benefits to the person who bore the expense of the deceased apportionnee's last sickness or burial under § 5.551(e), Persons entitled to accrued benefits.

(2) *Receiving apportionment of surviving spouse's death benefits.* If a child receiving an apportionment of a surviving spouse's dependency and indemnity compensation (DIC) or death pension dies, then the unpaid apportionment is payable only as accrued benefits to the veteran's surviving child who is entitled to death DIC or pension, under § 5.551(d)(1), Persons entitled to accrued benefits. If there is no eligible surviving child claimant, then the unpaid apportionment is payable only as

accrued benefits to the person who bore the expense of the deceased child's last sickness or burial under § 5.551(e), Persons entitled to accrued benefits.

(Authority: 38 U.S.C. 5112(b)(1), 5121(a), 5502(d))

§§ 5.785—5.789 [Reserved]

Incompetency and Payments to Fiduciaries and Minors

§ 5.790 Determinations of incompetency and competency.

(a) *Definition of mental incompetency.* A mentally incompetent person is one who because of injury or disease lacks the mental capacity to contract or to manage his or her own affairs, including disbursement of funds without limitation.

(b) *Authority.* (1) Agencies of original jurisdiction have sole authority to make official determinations of incompetency and competency for purposes of insurance (38 U.S.C. 1922) and, subject to § 13.56 of this chapter, disbursement of benefits. Such determinations are final and binding on field stations for these purposes.

(2) Where the beneficiary is rated incompetent, the Veterans Service Center Manager or Pension Management Center Manager will:

- (i) Develop information as to the beneficiary's social, economic, and industrial adjustment;
- (ii) Appoint or recommend appointment of a fiduciary as provided in § 13.55 of this chapter;
- (iii) Select a method of disbursing payment as provided in § 13.56 of this chapter or, in the case of a married beneficiary, appoint the beneficiary's spouse to receive payments as provided in § 13.57 of this chapter; and
- (iv) Authorize disbursement of the benefit.

(3) If, in the course of fulfilling the responsibilities assigned in paragraph (b)(2) of this section, the Veterans Service Center Manager or Pension Management Center Manager develops evidence indicating that the beneficiary may be capable of administering the funds payable without limitation, he or she will refer that evidence to the agency of original jurisdiction with a statement as to his or her findings. The agency of original jurisdiction will consider this evidence, together with all other evidence of record, to determine whether its prior determination of incompetency should remain in effect. Reexamination may be requested as provided in § 5.102, Meeting reexamination requirements, if necessary to properly evaluate the beneficiary's mental capacity to contract or manage his or her own affairs.

(c) *Medical opinion.* Unless the medical evidence is clear and convincing as to the person's incompetency, the agency of original jurisdiction will make no determination of incompetency without a definite expression regarding the question by the responsible medical authorities. Considerations of medical opinions will be in accordance with the principles in paragraph (a) of this section. A determination of incompetency should be based upon all evidence of record, and there should be a consistent relationship between the percentage of disability, facts relating to commitment or hospitalization, and the determination of incompetency.

(d) *Presumption in favor of competency.* Where reasonable doubt arises regarding a beneficiary's mental capacity to contract or to manage his or her own affairs, including the disbursement of funds without limitation, such doubt will be resolved in favor of competency. See § 5.3(b)(2), Standards of proof.

(e) *Due process.* Whenever it is proposed to make an incompetency determination, the beneficiary will be notified of the proposed action and of the right to a hearing as provided in § 5.83, Right to notice of decisions and proposed adverse actions. Such notice is not necessary if the beneficiary has been declared incompetent by a court of competent jurisdiction or if a guardian has been appointed for the beneficiary based upon a court finding of incompetency. If a hearing is requested, it must be held prior to a rating decision of incompetency. Failure or refusal of the beneficiary after proper notice to request or cooperate in such a hearing will not preclude a rating decision based on the evidence of record.

(f) *Effective date—(1) Incompetency determination.* The effective date of a determination of incompetency is the date of the rating decision finding incompetency. (This paragraph (f)(1) does not apply to an incompetency determination made for insurance purposes under 38 U.S.C. 1922.)

(2) *Competency determination.* If a beneficiary previously determined to be incompetent is later determined to be competent, the effective date of the determination of competency is the date the evidence of record shows the beneficiary regained competence. (Authority: 38 U.S.C. 501(a), 5502)

§ 5.791 General fiduciary payments.

(a) *Payments to a fiduciary and to or on behalf of a beneficiary.* (1) *Payment to a fiduciary.* VA may pay benefits to a duly recognized fiduciary on behalf of

a person who is mentally incompetent or who is a minor.

(2) *Direct payment to or on behalf of a beneficiary.* If the Veterans Service Center Manager or Pension Management Center Manager determines that it is in the best interest of a mentally incompetent or minor beneficiary, VA may pay benefits, regardless of any legal disability on the part of the beneficiary, directly to:

- (i) The beneficiary; or
- (ii) A relative of the beneficiary, or another person, for the use of the beneficiary.

(3) *Direct payment to certain minors.* Unless otherwise contraindicated by evidence of record, payment will be made directly to the following classes of minors without any referral to the Veterans Service Center Manager or Pension Management Center Manager:

- (i) Those who are serving in or have been discharged from the military forces of the United States; and
- (ii) Those who qualify for survivors benefits as a surviving spouse.

(4) *Immediate payment to spouse of incompetent veteran.* Unless otherwise contraindicated by evidence of record, if a veteran has no guardian, VA may immediately pay benefits to the spouse of an incompetent veteran for the use of the veteran and his or her dependents prior to referral to the Veterans Service Center Manager or Pension Management Center Manager. See § 13.57 of this chapter, Payment to the wife or husband of incompetent veteran.

Cross Reference: Part 13 of this title regarding VA fiduciary activities.

(b) *Payment to the parent of the child.* Where a child is in the custody of a natural parent, adoptive parent, or stepparent, benefits payable to the child may be paid to the parent as custodian of the child.

(c) *Payment to custodian-in-fact.* All or any part of a benefit due a minor or incompetent adult, payment of which is suspended or withheld because payment may not be properly made to an existing fiduciary, may be paid temporarily to the person having custody and control of the beneficiary. See § 13.63 of this chapter, Payment to custodian-in-fact.

(d) *Payment to bonded officer of Indian reservation.* Any benefits due an incompetent adult or minor Indian, who is a recognized ward of the Government, may be awarded to the superintendent or other bonded officer designated by the Secretary of the Interior to receive funds under 25 U.S.C. 14. See § 13.62 of this chapter, Payment to bonded officer of Indian reservation.

(e) *Effective date for payment to a fiduciary.* The effective date of payment

to a fiduciary is the first day of the month after the month for which VA last paid benefits.

Note to paragraph (e): The initial payment to the fiduciary shall include amounts withheld for possible apportionments as well as money in Personal Funds of Patients.

(Authority: 38 U.S.C. 5502)

§ 5.792 Institutional awards.

(a) *General.* When an incompetent veteran entitled to pension or disability compensation is a patient in a hospital or other institution, VA may pay all or part of the benefit to the chief officer of the hospital or institution for the veteran's use and benefit if the Veterans Service Center Manager or Pension Management Center Manager determines that such payment will:

- (1) Adequately provide for the needs of the veteran; and
- (2) Obviate the need for appointment of another type of fiduciary.

Cross Reference: § 13.61, Payment to the chief officer of institution.

(b) *Non-VA hospital or institution.* (1) In an institutional award of pension or disability compensation, VA may pay to the chief officer of a non-VA hospital or institution on behalf of the veteran an amount determined under § 13.61 of this chapter.

(2) Any excess funds held by the chief officer of a non-VA institution under this section that are not necessary for the benefit of the veteran will be returned to VA or to a fiduciary, if one has been appointed.

(3) If payments are being made to the chief officer of a non-VA hospital or institution, VA will deposit all sums otherwise payable in excess of the institutional award and any apportionments in Personal Funds of Patients.

(c) *Excess funds.* Upon the death of an institutionalized incompetent veteran with no surviving heirs, excess funds will be returned to VA.

(d) *Apportionment.* An institutionalized incompetent veteran's benefits may be apportioned to his or her dependents under § 5.771, Special apportionments.

(e) *Effective date for payment of institutional award.* The effective date of payment to the chief officer of a hospital or institution is:

(1) The first day of the month after the month for which VA last paid benefits; or

(2) On an initial or resumed award, the date of entitlement to benefits, subject to any amounts paid or withheld for apportionment of benefits.

(f) *Effective date for discontinuance of institutional award.* The effective date of discontinuance of payment to the chief

officer of the hospital or institution is the first day of the month after the month:

- (1) A fiduciary is appointed;
- (2) The veteran is discharged from the hospital or institution; or
- (3) The veteran is rated competent.

(Authority: 38 U.S.C. 501(a), 5307, 5502)

§ 5.793 Limitation on payments for a child.

If a fiduciary has been appointed for a child because the child is a minor, then VA will not pay benefits to that fiduciary for any period beginning on the date that the child attains the age of majority under the law of the State where the child resides. For any period beginning on that date, if payment is otherwise in order, then VA will pay benefits as follows:

(a) *Competent child reaches age of majority.* If the child is competent, then VA will pay benefits directly to the child. Under these circumstances, VA will retroactively pay the child any benefits that were not paid for a period before the child attained the age of majority.

(b) *Incompetent child reaches age of majority.* If the child is incompetent, then VA will pay benefits to a fiduciary appointed for the child as a mentally incompetent adult unless benefits are paid directly to the child under § 5.791(a)(2)(i), General fiduciary payments.

§ 5.794 Beneficiary rated or reported incompetent.

(a) *General.* VA will not routinely suspend payments directly to a beneficiary who is or may be incompetent while any of the following is pending:

- (1) Development of the issue of incompetency;
- (2) Certification of a fiduciary by the Veterans Service Center Manager or Pension Management Center Manager; or
- (3) A recommendation by the Veterans Service Center Manager or Pension Management Center Manager that payments should be paid directly to the beneficiary.

(b) *Application.* This policy applies to all cases including, but not limited to, cases in which:

- (1) Notice or evidence is received that a guardian has been appointed for the beneficiary;
- (2) Notice or evidence is received that the beneficiary has been committed to a hospital; or
- (3) The beneficiary has been rated incompetent by VA.

§ 5.795 Change of name of fiduciary.

If a fiduciary changes his or her name because of marriage or divorce, VA will

accept the fiduciary's statement of the name change.

§ 5.796 Child's benefits to a fiduciary of an incompetent surviving spouse.

If benefits are payable to a surviving spouse for a child and the child is separated from the surviving spouse because of the surviving spouse's incompetency, no apportionment of benefits to the child is required. If the fiduciary is adequately taking care of the needs of the child from the surviving spouse's estate, either voluntarily or pursuant to a decree of court, VA may pay all amounts payable for the child to the fiduciary.

§ 5.797 Testamentary capacity for VA insurance purposes.

When VA refers a case to an agency of original jurisdiction involving the testamentary capacity of the insured to perform a testamentary act (execute a designation or change of beneficiary or execute a designation or change of option), the following considerations will apply:

(a) *Testamentary capacity* means that degree of mental capacity necessary to enable a person to perform a testamentary act. This generally requires that the insured:

- (1) Reasonably comprehend the nature and significance of his or her testamentary act, that is, the subject and extent of his or her disposition;
- (2) Recognize the object of his or her bounty; and

(3) Appreciate the consequences of his or her testamentary act, uninfluenced by any material delusion as to the property or persons involved.

(b) VA will consider all evidence of record, with emphasis being placed on evidence pertaining to the mental condition of the insured at the time, or nearest to the time, that the insured performed the testamentary act.

(c) There is a general but rebuttable presumption that every insured person possesses testamentary capacity when performing a testamentary act. Therefore, reasonable doubt should be resolved in favor of testamentary capacity. See § 5.3(b)(2), Standards of proof.

§ 5.798 Payment of disability compensation previously not paid because an incompetent veteran's estate exceeded \$25,000.

If a veteran who was denied payment of disability compensation under § 3.853 of this title is subsequently rated competent for a continuous period of more than 90 days, the withheld disability compensation shall be paid to the veteran in a lump-sum.

Cross Reference: § 3.853 of this title, Incompetents; estate over \$25,000 (denying payment of disability compensation to an incompetent veteran who had no dependents and had an estate that exceeded \$25,000, during the period from November 1, 1990, through September 30, 1992).

(Authority: 38 U.S.C. 5505, as in effect before Nov. 2, 1994)

§ 5.799–5.809 [Reserved]

Payments to Incarcerated Beneficiaries

§ 5.810 Incarcerated beneficiaries—general provisions and definitions.

(a) *Definitions*— (1) *Incarceration* means confinement in a Federal, State, or local prison, jail, or other penal institution, including a private detention facility pursuant to an agreement with a Federal, State, or local unit of government. “Incarceration” does not include house arrest, parole, probation, work release, participation in a community control program, commitment to a halfway house or residential re-entry center, or confinement in a foreign country’s prison.

(2) *Felony*, for the purposes of §§ 5.811 through 5.817, means any offense punishable by death or incarceration for a term exceeding 1 year, unless specifically categorized as a misdemeanor under the law of the prosecuting jurisdiction.

(b) *Classification of foreign offenses*. A felony includes an offense that is prosecuted by a foreign country if the offense is equivalent to a felony under the laws of the United States. A misdemeanor includes an offense that is prosecuted by a foreign country if the offense is equivalent to a misdemeanor under the laws of the United States.

(c) *Length of incarceration*. The 60-day periods of incarceration described in §§ 5.811 through 5.813 begin on the day after the beneficiary is convicted of a felony (or misdemeanor for pension), if the beneficiary is incarcerated as of that date, even if the beneficiary is not sentenced on that date. For beneficiaries who are reincarcerated, such as after conditional release on probation or parole, VA will begin counting a new 60-day period on the first full day of reincarceration.

(d) *Requirement to inform VA*. A claimant or beneficiary must inform VA when he or she becomes incarcerated for:

(1) Conviction of a felony if the person is claiming or receiving compensation, pension, or dependency or indemnity compensation; or

(2) Conviction of a misdemeanor if the person is claiming or receiving pension.

(e) *Notice to the incarcerated beneficiary*. VA will send notice to the incarcerated beneficiary that dependents may be entitled to an apportionment while the beneficiary is incarcerated. The notice will also include information explaining the conditions under which VA may resume payments to the incarcerated beneficiary after the beneficiary is released from incarceration.

(f) *Effective dates*. Payments of disability compensation, dependency and indemnity compensation, or pension will be reduced on the 61st day of incarceration after conviction of a felony. Payments of pension will also be reduced on the 61st day of incarceration after conviction of a misdemeanor.

(Authority: 38 U.S.C. 501, 1505, 5313)

§ 5.811 Limitation on disability compensation during incarceration.

(a) *General*. VA will limit the amount of disability compensation paid to a veteran who has been incarcerated for more than 60 days after conviction of a felony if:

(1) The veteran committed the felony after October 7, 1980;

(2) The veteran was incarcerated on October 1, 1980, for conviction of the felony and was awarded disability compensation after September 30, 1980 (This paragraph (a)(2) applies only to the payment of disability compensation after September 30, 1980.); or

(3) The veteran was incarcerated on October 7, 1980, for conviction of the felony and remained incarcerated for that felony on December 27, 2001. (This paragraph (a)(3) applies only to the payment of disability compensation after March 31, 2002.)

(b) *Retroactive awards*. Whenever disability compensation is awarded to an incarcerated person, any amounts due for periods prior to the date of reduction under this section shall be paid to the incarcerated person.

(c) *Amount payable during incarceration*— (1) *Veteran rated 20 percent or more disabled*. For an incarcerated veteran who is rated 20 percent or more disabled for service-connected disabilities, VA will limit disability compensation to no more than the rate payable under 38 U.S.C. 1114(a) for a veteran rated 10 percent disabled.

(2) *Veteran rated less than 20 percent disabled*. For an incarcerated veteran who is rated less than 20 percent disabled for service-connected disabilities, VA will limit disability compensation to no more than one-half the rate payable under 38 U.S.C. 1114(a) for a veteran rated 10 percent disabled.

This paragraph (c)(2) applies even if such a veteran is entitled to special

monthly compensation under 38 U.S.C. 1114(k) or (q).

Cross Reference: For the rule on total-disability ratings based on individual unemployability that would first become effective while a veteran is incarcerated, see § 5.284(b).

(Authority: 38 U.S.C. 501(a), 1114, 5313; Pub. L. 107–103, Sec. 506, 115 Stat. 996–97)

§ 5.812 Limitation on dependency and indemnity compensation during incarceration.

(a) *General*. VA will limit dependency and indemnity compensation (DIC) paid to a beneficiary who has been incarcerated for more than 60 days after conviction of a felony if:

(1) The beneficiary committed the felony after October 7, 1980; or

(2) The beneficiary was incarcerated on October 1, 1980 for conviction of the felony and was awarded DIC after September 30, 1980. (This paragraph (a)(2) applies only to the payment of DIC after September 30, 1980.)

(b) *Amount payable during incarceration*. VA will limit DIC to no more than one-half the rate of disability compensation payable under 38 U.S.C. 1114(a) to a veteran rated 10 percent disabled.

(c) *Parents’ DIC—Effect on non-incarcerated parent*. If two parents are both entitled to DIC and were living together before the benefits payable to one were reduced due to incarceration, VA will determine entitlement to DIC for the other parent as if they were not living together.

(d) *Retroactive awards*. Whenever DIC is awarded to an incarcerated person, any amounts due for periods prior to the date of reduction under this section shall be paid to the incarcerated person.

(Authority: 38 U.S.C. 501(a), 1114, 5313)

§ 5.813 Discontinuance of pension during incarceration.

(a) *General provision*. VA will discontinue pension payments to or for a person who has been incarcerated for more than 60 days after conviction of a felony or of a misdemeanor. This section applies to any pension that VA administers under a public or private law.

(b) *Veteran entitled to pension and disability compensation*. When an incarcerated veteran is disqualified from receiving pension payments under this section but is also entitled to disability compensation, VA will pay disability compensation in lieu of pension under either of the circumstances described in paragraphs (b)(1) or (b)(2) of this section.

(1) If the veteran does not have a spouse or child, then the award of

disability compensation in such cases will be effective on the date pension is discontinued under this section.

(2) If the veteran has a spouse or child but elects to receive disability compensation after VA has notified the veteran of the effect of electing disability compensation on the amount available for apportionment, then the award of disability compensation will be effective on the later of the date VA received the veteran's election or the date of discontinuance of pension under paragraph (a) of this section. (If the veteran does not elect disability compensation, pension will nevertheless be discontinued under paragraph (a) of this section.)

(Authority: 38 U.S.C. 501(a), 1505)

§ 5.814 Apportionment when a primary beneficiary is incarcerated—

(a) *Notice to dependents of incarcerated beneficiary.* (1) When VA limits or discontinues benefits under §§ 5.811 through 5.813, VA will send notice to any dependent of the right to apply for an apportionment if VA is aware of the dependent's existence and can obtain the necessary address.

(2) If an apportionment is awarded, VA will send notice to the apportionee that VA will immediately discontinue the apportionment when the incarcerated beneficiary is released. The notice will also inform the apportionee that if the apportionee and the incarcerated beneficiary do not live together when the incarcerated beneficiary is released, the apportionee may submit a new apportionment claim.

(b) *Apportionment of disability compensation or dependency and indemnity compensation—(1) Eligibility for apportionment.* (i) VA may apportion an incarcerated veteran's unpaid disability compensation to the veteran's spouse, child, or dependent parent.

(ii) VA may apportion an incarcerated surviving spouse's unpaid dependency and indemnity compensation (DIC) to a child.

(iii) VA may apportion an incarcerated child's unpaid DIC to the surviving spouse or to another child.

(2) *Amount of apportionment.* The apportionment amount of a beneficiary's unpaid disability compensation or DIC benefits will be based on individual need. In determining individual need, VA will consider factors such as:

(i) The amount of VA benefits available to be apportioned;

(ii) The net worth, income, and expenses of the apportionment claimant(s); and

(iii) The special needs of the apportionment claimant(s).

(c) *Apportionment of veteran's pension—(1) Requirements.* VA may apportion an incarcerated veteran's unpaid pension to the veteran's spouse or child if all of the following conditions are met:

(i) The veteran would continue to be entitled to pension if not for the incarceration;

(ii) The annual income of the spouse or child is such that Improved Death Pension would be payable;

(iii) If the veteran was receiving Old-Law Pension, the spouse or child was recognized by VA as the veteran's dependent before July 1, 1960; and

(iv) If the veteran was receiving Section 306 Pension, the spouse or child was recognized by VA as the veteran's dependent before January 1, 1979.

(2) *Amount of apportionment.* VA will apportion an amount of such unpaid pension equal to the lesser of:

(i) The amount of Improved Death Pension that would be payable to the apportionee; or

(ii) The amount of pension that the veteran received for the month before incarceration.

(d) *Allocation of death pension.* The effective date rules in paragraph (e) of this section and in § 5.816(c) apply to the allocation of death pension under this paragraph (d).

(1) If a surviving spouse is disqualified from receiving pension payments under § 5.813, VA may pay a child the rate of Improved Death Pension that would be payable if the incarcerated surviving spouse did not exist.

(2) If a surviving child is disqualified from receiving pension payments under § 5.813, VA may pay a surviving spouse or another child the rate of Improved Death Pension that would be payable if the incarcerated child did not exist.

(e) *Effective date of apportionment because of incarceration—(1) General.* Except as provided in paragraph (e)(2) of this section, the effective date of an apportionment or allocation is the date VA receives an apportionment claim.

(2) *Specific effective dates—(i) Disability compensation, dependency and indemnity compensation, and disability pension.* The effective date of an apportionment of disability compensation, dependency and indemnity compensation (DIC), or disability pension is the date of the reduction or discontinuance of benefits to the incarcerated primary beneficiary (that is, the 61st day of incarceration following conviction) if VA receives an apportionment claim no later than 1 year after the notice required by § 5.810(e) (notifying the incarcerated beneficiary that his or her dependents

may be entitled to an apportionment) and if any necessary evidence is received by VA no later than 1 year after the date of VA's request for the evidence.

(ii) *Death pension.* The effective date of an allocation of death pension is the date of the discontinuance of benefits to the incarcerated primary beneficiary (that is, the 61st day of incarceration following conviction) if evidence of income is received by VA no later than 1 year after the date of VA's request for the evidence.

(3) *Retroactive awards.* If VA retroactively grants an apportionment or allocation under this section, VA will:

(i) Not re-pay to the apportionee any benefits previously paid to the primary beneficiary; and

(ii) Consider any amounts that were paid to the primary beneficiary, but were due to the apportionee, as having been paid to the apportionee.

(Authority: 38 U.S.C. 501, 1505, 5313)

§ 5.815 Resumption of disability compensation or dependency and indemnity compensation upon a beneficiary's release from incarceration.

(a) *Effective date of benefit resumption.* Except as provided in paragraph (d) of this section, if the beneficiary remains entitled to disability compensation or dependency and indemnity compensation (DIC):

(1) The effective date of resumption of the full benefit rate upon a beneficiary's release from incarceration is the date of release if VA is informed of the release less than 1 year after the release. Payment of the full benefit rate is subject to paragraphs (b) and (c) of this section.

(2) The effective date of resumption of the full benefit rate is the date VA is informed of the release if VA is informed of the release 1 year or more after the release. Payment of the full benefit rate is subject to paragraphs (b) and (c) of this section.

(b) *Benefits were apportioned and all apportionees reunited.* This paragraph (b) applies if VA apportioned benefits under § 5.814(b) and the released beneficiary is reunited with all apportionees. For purposes of paragraphs (b) and (c) of this section, a dependent parent apportionee, receiving an apportionment under § 5.814(b), will be considered as having been reunited with the beneficiary.

(1) *Effective date of apportionment discontinuance.* As soon as VA is informed that the beneficiary has been released, VA will discontinue the apportionment effective the first day of the month after the month for which VA last paid the apportionment.

(2) *Retroactive payments to released beneficiary.* For the period from the effective date of resumption of the full benefit rate to the effective date of the discontinuance of the apportionment, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the sum of:

(i) The apportionment rate paid to the apportionee for that period; and
(ii) The incarcerated rate paid to the beneficiary for that period.

(c) *Released beneficiary not reunited with all apportionees.* This paragraph (c) applies if VA apportioned benefits under § 5.814(b) and the released beneficiary is not reunited with all apportionees. For purposes of paragraphs (b) and (c) of this section, a dependent parent apportionee, receiving an apportionment under § 5.814(b), will be considered as having been reunited with the beneficiary.

(1) *Effective date of apportionment reduction or discontinuance.* As soon as VA is informed that the beneficiary has been released, VA will:

(i) Discontinue the apportionment to an apportionee with whom the beneficiary is reunited effective the first day of the month after the month for which VA last paid the apportionment; and

(ii) Reduce an apportionment to an apportionee with whom the beneficiary is not reunited to the additional amount payable to the beneficiary for the apportionment effective the first day of the month after the month for which VA last paid the apportionment. VA will pay the beneficiary the full benefit rate minus the new apportionment amount effective on date of the apportionment reduction.

(2) *Retroactive payments to released beneficiary.* For the period from the effective date of resumption of the full benefit rate to the effective date of the discontinuance or reduction of the apportionment, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the sum of:

(i) The apportionment rate paid to the apportionee for that period; and
(ii) The incarcerated rate paid to the beneficiary for that period.

(d) *Conviction overturned on appeal.* If a conviction is overturned on appeal and the beneficiary remains entitled to disability compensation or DIC, the effective date of resumption of the full

benefit rate is the date of reduction of benefits. Payment of the full benefit rate is subject to paragraphs (b) and (c) of this section.

(Authority: 38 U.S.C. 501(a), 5313)

§ 5.816 Resumption of pension upon a beneficiary's release from incarceration.

(a) *Effective date of benefit resumption.* If the beneficiary remains entitled to pension:

(1) The effective date of resumption of pension upon a beneficiary's release from incarceration is the date of release if VA is informed of the release less than 1 year after the release. Payment of pension is subject to paragraphs (b) and (c) of this section.

(2) The effective date of resumption of pension is the date VA is informed of the release if VA is informed of the release 1 year or more after the release. Payment of pension is subject to paragraphs (b) and (c) of this section.

(b) *Disability pension was apportioned.* This paragraph (b) applies if VA apportioned a veteran's disability pension under § 5.814(c) or disability compensation under § 5.814(b) because the veteran elected to receive disability compensation in lieu of disability pension under § 5.813(b)(2).

(1) *Effective date of apportionment discontinuance.* As soon as VA is informed that the beneficiary has been released, VA will discontinue the apportionment effective the first day of the month after the month for which VA last paid the apportionment.

(2) *Retroactive payments to released beneficiary.* For the period from the effective date of resumption of pension to the effective date of the discontinuance of the apportionment, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the sum of:

(i) The apportionment rate paid to the apportionee for that period; and

(ii) The incarcerated rate paid to the beneficiary for that period (under § 5.813(b) if the veteran was entitled to disability compensation at the incarcerated rate).

(c) *Death pension was allocated.* This paragraph (c) applies if VA allocated death pension under § 5.814(d).

(1) *Effective date of reduction or discontinuance.* As soon as VA is informed that the beneficiary has been released, VA will reduce or discontinue

the rate of Improved Death Pension paid to a surviving spouse or surviving child under § 5.814(d), effective the first day of the month after the month for which VA last allocated Improved Death Pension.

(2) *Retroactive pension payments to released beneficiary.* For the period from the effective date of resumption of pension to the effective date of the reduction or discontinuance of pension to a surviving spouse or surviving child, VA will retroactively pay the released beneficiary the full benefit rate minus an amount equal to the difference between:

(i) The rate paid to the surviving spouse or surviving child under § 5.814(d) for that period; and

(ii) The rate that would have been payable to the surviving spouse or surviving child for that period if the released beneficiary's pension had not been discontinued under § 5.813.

(Authority: 38 U.S.C. 501(a), 1505)

§ 5.817 Fugitive felons.

(a) *General rule.* VA will not pay or apportion disability compensation, dependency and indemnity compensation, or Improved Pension to, for, or on behalf of a person for any period during which that person is a fugitive felon.

(b) *Definitions.* (1) *Fugitive felon* means a person who is:

(i) Fleeing to avoid prosecution for a felony or for an attempt to commit a felony;

(ii) Fleeing custody or confinement after conviction of a felony or conviction of an attempt to commit a felony; or

(iii) Fleeing to avoid custody or confinement for violating a condition of probation or parole imposed for commission of a felony under Federal or State law.

(2) *Felony.* For purposes of this § 5.817, *felony* refers to an offense that is classified as a felony under the laws of the place from which the person flees; however, it also includes an offense classified as a high misdemeanor that would be a felony offense under Federal law.

(Authority: 38 U.S.C. 5313B)

§§ 5.818–5.819 [Reserved]

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